# AT&T's INTENTIONAL FRAUD ON THE FEDERAL COURTS AND FCC

## Background--History of Venues

-1995-1996 NJFDC (plaintiffs won May 1995 & March 1996 Decisions Judge Politan)
-1996 Third Circuit Vacates NJFDC on Primary Jurisdiction Grounds--Refers case to FCC
-Oct 2003 First FCC Decision (Plaintiffs won as FCC denied AT&T's sole defense of Fraudulent use under section 2.2.4 of AT&T's tariff)
-Jan 2005 D.C. Circuit Appeal (Plaintiffs won case as the FCC's denial of AT&T's sole fraudulent use defense was not remanded to FCC)
-2006 NJFC Judge Bassler erroneously sends Second Referral to FCC having to do with new defenses AT&T creates 11 years into the case in 2006.
-2007 The FCC issues on Jan 12th 2007 an Order confirming Judge Bassler's referral on a defense under section 2.1.8 is outside the scope of the case and thus there are no pending issues to resolve.
-March 2015 Plaintiffs moved to lift stay in NJ (Judge Wigenton 3rd Judge in NJ on Case) Plaintiffs former counsel does not present the NJFDC the FCC Jan 12th 2007 Order confirming the 2006 Referral is outside the scope of the case and thus is moot.
-Oct 2015- FCC understands there are no pending issues and agrees to review plaintiff's attorney ethics complaint and to coordinate with DC Bar Counsel, NJ Attorney Ethics Staff, and Special Counsel of DC Circuit Court to investigate AT&T counsels misrepresentations.

This brief explains the case and explains intentional misrepresentations made by numerous AT&T counsels. At the end of this document I will provide the names of each counsel and which State each is licensed in and what their misrepresentations were in the case. The jurisdiction issue is the issue for the NJ Attorney Ethics, DC Bar Counsel and DC Circuit Court staff.

## Background

1) Plaintiffs were aggregators/resellers of AT&T toll free service enrolling non-affiliated businesses under one discount plan called CSTPII/RVPP Plan. To obtain about a 28% discount the aggregator made a substantial time and volume commitment to AT&T. Businesses that were receiving for example a 6% discount on their own directly with AT&T could enroll under plaintiff's CSTPII/RVPP plan and were provided between 15% to 23% discount. The difference between the 28% discount afforded the aggregator and for example 23% given the business end-user location was 5% spread in revenue of the phone bill, which was the compensation the plaintiff's obtained.

2) Despite in 1993 having over hundred million in revenue commitment per year to AT&T, the 28% discount was ridiculously low compared to discounts of almost 66% AT&T was providing its other AT&T customers. For example other AT&T customers like Public Service Enterprises (PSE) only had to meet $4.8 million per year revenue commitment and PSE was provided a 66% discount. AT&T discriminated against plaintiffs and would not provide the 66% discount but advised another aggregator Combined Companies Inc. (CCI) that it would provide a substantial discount to CCI. Plaintiffs transferred their entire CSTPII/RVPP plans to CCI in 1994. CCI and Inga Companies while negotiating for a new Contract Tariff transferred the majority of the accounts from its 28% CSTPII/RVPP plans to PSE's 66% discount plan to obtain additional revenue but not transfer its CSTPII/RVPP plan. The plans had already met fiscal year revenue commitments so the remaining plan with its commitments were not an issue. Additionally the plans were what is referred to as Pre June 17th 1994 grandfathered which means the revenue and time commitment on the non-transferred plan could be restructured to avoid any shortfall or termination liability on the non-transferred plans revenue and time commitment.

3) AT&T's tariff section 2.1.8 governs the transfer of either 1) a specified quantity of end-user accounts from the Former AT&T customers' PLAN to a new AT&T Customers plan –referred to as a Traffic Only transfer as opposed to…. 2) PLAN TRANSFER: The transfer in ownership of the entire CSTPII/RVPP plan with all end-user accounts. AT&T created a Transfer of Service Agreement Form (TSA) to effectuate either one of the above types of transfers under section 2.1.8. Due to the fact that the TSA form was used for both types of transfers it obviously necessitated notations on the form and a cover letter to explain whether the transfer was for specified accounts (Traffic Only transferred not the plan) or the entire plan with all the accounts. When plaintiff transferred its <u>entire plan</u> and all accounts to CCI the revenue and time commitments of course went to CCI as the entire plan was transferring. AT&T refused to provide a 66% discount plan like CT516 because it didn't want to provide deeper discounts to a qualified aggregator. So a transfer from CCI of specified accounts was ordered from CCI's plans to PSE's CT 516 that enjoyed a 66% discount instead of 28%. The 4 Inga Companies were to get 80% and CCI 20% of the additional compensation from PSE even though the Inga Companies revenue contributed was 97% to 3% contributed by CCI. The contract with PSE allowed

plaintiffs to get its traffic back from PSE within 30 days when AT&T finally provided a discount plan that plaintiffs obviously qualified for.

4) AT&T refused to proceed with the traffic only transfer based upon its "fraudulent use provision." AT&T asserted that due to the tariffs mandate that on traffic only transfers the plans revenue and time commitment and associated obligations for shortfall and termination (S&T) for failure to meet those obligations, must remain with the non-transferred plan. AT&T's position was that there would be no way for CCI to meet the tariffed commitments on the non-transferred CCI plans. AT&T's fraudulent use provision argument under 2.2.4 of AT&T's tariff confirmed AT&T's tariff interpretation of the terms and conditions of section 2.1.8: The revenue and time commitments and their associated liability for shortfall and termination penalties for failure to meet the revenue and time commitments must stay with CCI's non-transferred plan, when only end-user traffic was transferring to PSE and not the entire plan. AT&T's use of its "2.2.4 fraudulent use provision" was a fraud in and of itself as CCI's transferor plans had already met their fiscal year revenue commitment and could be restructured continually to avoid shortfall and termination penalties as the plans were pre June 17$^{th}$ 1994 CSTPII/RVPP penalty immune.

5) NJFDC Judge Politan understood the plans had met their commitment and were Pre June 1994 grandfathered and could easily avoid the plans revenue commitment. Therefore Judge Politan issued an order in March 1996 against AT&T despite AT&T counsels assertion that it could deny the traffic transfer based upon AT&T's potential collection of shortfall and termination penalties on the non-transferred plans. CCI was Inga companies co-plaintiff and decided in July 1997 to accept AT&T's cash plus CCI did not have to pay AT&T for the almost $80 million in charges AT&T placed on the end users bills in June 1996, which was 18 months after the denied Jan 1995 traffic transfer. CCI agreed to aid AT&T in its continued defense against the Inga Company remaining plaintiff.

6) The Third Circuit vacated Judge Politan on primary jurisdiction grounds and the case went to the FCC. The FCC in Oct 2003 denied AT&T's only defense of fraudulent use. The FCC 2003 Decision did not decide whether AT&T's fraudulent use defense had any merit to begin with. It simply stated that even if AT&T reasonably expected fraudulent use it would have to use a remedy outlined by its tariff. AT&T's tariff mandated that AT&T could only temporarily

suspend service. AT&T violated the tariff by permanently denying the CCI-PSE traffic transfer. Because AT&T used an illegal remedy to effectuate its sole fraudulent use defense by law it could not rely upon the section 2.2.4 fraudulent use provision. Thus AT&T's sole defense was denied by the FCC.

7) The FCC saw that plaintiffs used section 2.1.8 to transfer the traffic but did not see where in section 2.1.8 that it allowed direct traffic only transfers between AT&T customers. The FCC's position to the D.C. Circuit was **2.1.8 did not prohibit traffic only transfers**. The FCC also decided that another section of the tariff 3.3.1.Q would allow CCI to delete the end-user accounts from the 28% plan and then PSE to add the accounts. Therefore the FCC decided in the Inga Companies favor---basically saying that the tariff in general doesn't prohibit traffic only transfers without the plan and its commitments from transferring. Even though the FCC did not see where in tariff section 2.1.8 it expressly allowed end user accounts to transfer without the plan it did use section 2.1.8 to interpret which obligations must transfer when traffic only and not the plan was transferred. The FCC agreed with plaintiffs, AT&T and Judge Politan that under 2.1.8 the revenue and time commitment do not get assumed by PSE and must stay with the non-transferred CCI plan. The FCC rejected AT&T's 2.2.4 fraudulent use assertion of being potentially defrauded of shortfall and termination liability on the non-transferred plans which was AT&T's sole defense.

8) AT&T appealed the FCC's 2003 Decision to the D.C. Circuit. The D.C. Circuit did not find fault with the FCC's decision to deny AT&T's sole defense of section 2.2.4 fraudulent use. The D.C. Circuit saw that traffic only transfers under 2.1.8 wasn't only NOT PROHIBITED but it was EXPRESSLY ALLOWED as the CCI to PSE traffic transfer did. The DC Circuit did not remand the FCC's decision to deny AT&T's sole defense of fraudulent use. The FCC in its Jan 12th 2007 FCC Order accepted that AT&T's transfer section 2.1.8 ---as used by plaintiffs to transfer traffic to PSE---expressly allows the movement of end user traffic instead of deleting from one plan and adding the accounts to the other plan. The fact that the FCC did not also recognize that 2.1.8 expressly allowed for the movement of accounts without the plan did not in any way effect the FCC's decision to deny AT&T's sole defense of fraudulent use under 2.2.4.

9) AT&T was in a bind at the DC Circuit because it 1) had to argue against the FCC's decision to deny AT&T's sole defense due to the illegal remedy and AT&T understood it really didn't

have any wiggle room on this as the FCC rule of use of illegal remedies to effectuate AT&T's fraudulent use defense was conclusive. 2) AT&T argued that the FCC was wrong in believing that section 2.1.8 did not expressly allow for account movement without the plan. But such an AT&T position to the DC Circuit would actually be arguing in favor of plaintiff's use of 2.1.8 to direct transfer accounts from CCI to PSE. So for the first time AT&T counsel mints a brand new defense in 2005 under section 2.1.8 as the reason why it did not transfer the accounts in 1995. Remember in 1995 AT&T asserted that section 2.1.8 was being strictly being adhered to and AT&T's only defense was section 2.2.4 fraudulent use. AT&T in fact tried to change 2.1.8 retroactively (Tr8179) because AT&T understood section 2.1.8 was being properly adhered to. The defense minted to DC Circuit we will refer to as AT&T's "No obligations were transferred defense." AT&T counsel David Carpenter short quoted a sentence to transfer traffic only without the plan and said for the first time ever that this meant transfer traffic but don't transfer any obligations. There are two basic obligations that do get transferred when accounts only get transferred (bad debt and minimum payment period get transferred for the accounts that are transferred) but AT&T claimed that not even these 2 were transferred. AT&T saw the FCC had denied its only 2.2.4 fraudulent use defense and needed to make up a new defense.

10) At the DC Circuit AT&T, FCC and plaintiffs **all agreed** that revenue and time commitments do not transfer on a traffic only transfer like the CCI-PSE transfer. All parties agreed that revenue and time commitments **only transfer** when the entire plan transfers as in the first transfer when the Inga Companies transferred its entire plan to CCI. Despite all parties position to the DC Circuit regarding the allocation of obligations the DC Circuit was totally confused regarding which obligations transfer under 2.1.8. The below case overview will explain why the confusion from the DC Circuit Court. The DC Circuit confusion did not negatively impact the FCC's decision to deny AT&T's sole defense under 2.2.4.—as the DC Circuit did not remand the FCC's decision to deny AT&T's sole defense under 2.2.4. The D.C. Circuit Court's task wasn't even to evaluate which obligations transfer as that wasn't before the FCC.

11) The case went back to NJFDC where Judge Bassler took over the case from retired Judge Politan. AT&T had lost its sole 2.2.4 fraudulent use defense at FCC and the DC Circuit did not find fault with the FCC on its denial of AT&T's sole defense. AT&T in house counsel then removes all counsels from the case that had asserted revenue and time commitments **do not**

transfer on “traffic only” transfers, as that was the very basis of AT&T’s fraudulent use defense. So AT&T counsels (Fred Whitmer, Charles Fash, Richard Meade, Aryeh Friedman, all disappear from the case. New Counsel Joseph Guerra and Richard Brown are now brought aboard to now claim for the first time in 2006 that revenue and time commitments must transfer on traffic only non-plan transfers. So 11 years into the case AT&T incredibly advises the NJFDC Judge Bassler that the reason why it denied the Jan 1995 traffic only non-plan transfer was due to a brand new defense created in 2006!

12) Judge Bassler sends a new referral to the FCC in 2006 regarding which obligations should transfer under 2.1.8., even though AT&T never had a defense in 1995 due to not complying with section 2.1.8. AT&T only defense was under section 2.2.4 (fraudulent use). AT&T asserted that since under 2.1.8 the revenue and time commitments **do not transfer from CCI to PSE,** AT&T claimed under 2.2.4 fraudulent use that CCI would not be meet the non-transferred plans commitments. So despite the fact that AT&T obviously had **zero evidence** of traffic only non-plan transfers in which these customer plan obligations transfer ---AT&T intentionally lied to Judge Bassler that customer plan obligations must transfer on non-plan transfers. Below plaintiffs will also show how AT&T attempted to cover-up its intentional misrepresentations.

13) The case is stayed in NJFDC. Recently plaintiffs went back to the NJFDC and Judge Wigenton is now the third Judge on the case in NJ taking over for the retired Judge Bassler. Judge Wigenton was never presented the Jan 12th 2007 Order which determined the Judge Bassler referral on 2.1.8 issues was outside the scope of the case. On March 18th 2015 Judge Wigenton advised plaintiffs that it should file a writ of mandamus at the DC Circuit to order the FCC to decide the case as it has been at the FCC since 2006. After the March 18th 2015 Oral Argument in NJFDC plaintiffs found the reason why the FCC has not ruled. Below plaintiffs address the intentional misrepresentations that AT&T counsels Richard Brown and Joseph Guerra made during the latest proceeding before Judge Wigenton. The following is a post Oral Argument statement of facts that indicates intentional misrepresentation on the NJFDC, Third Circuit, D.C. Circuit and the FCC. AT&T counsels created many intentional misrepresentations to prevent a transaction that had been done many times before under 2.1.8. AT&T simply did not want to pay an additional 38% compensation on $54 million per year. The following addresses:

1) Details the DC Circuits and FCC's position that AT&T lost the case when the DC Circuit Decision did not remand the FCC's decision to deny AT&T's sole defense of fraudulent use.
2) Misrepresentations made by AT&T counsels on all Courts and FCC.

**Preliminary Overview-Judge Bassler's Referral is Moot by D.C. Decision & FCC 2007 Order**

14) Plaintiffs notified the D.C. Circuit and FCC that NJFDC Judge Wigenton advised plaintiffs to go to DC Circuit and seek a writ of mandamus against the FCC to rule on Judge Bassler's 2.1.8 referral. Plaintiffs again reviewed the Jan 12th 2007 FCC Order because it was preparing for a writ of mandamus filing. Plaintiffs finally realized that the 2007 FCC Order shows the FCC hadn't ruled on Judge Bassler's referral because there was no controversy under the Administrative Procedure Act in regards to Judge Bassler's 2006 section 2.1.8 referral, **because those 2.1.8 issues are outside the scope of the case and thus moot.** The 2007 FCC Order eliminated all AT&T's 2.1.8 defenses as outside the scope of case as AT&T's only defeated defense in 1995 was **2.2.4 fraudulent** use and that sole defense was FCC denied and not remanded by DC Circuit.

15) Additionally the FCC 2007 Order **explicitly advised the NJFDC** that Judge Bassler's 2006 referral question on 2.1.8 obligation allocation has already been "extensively briefed." In fact the 2007 FCC Order at FN 13 lists many comments of the parties stating only bad debt and minimum payment period transfer but customer plan obligations don't transfer. By Supreme Court law the Third Circuit referral has been decided and the stay should have been lifted and damages phase scheduled but Judge Wigenton was never presented the Jan 12th 2007 FCC Order. The FCC also confirmed that ***even if*** Judge Bassler's referral was within the scope of 2.1.8, the case is also **moot** as any FCC change in the terms and conditions of section 2.1.8 is **prospective under the 1934 Communications Act;** thus plaintiffs transfer would be grandfathered anyway.

16) Although the Judge Bassler referral on 2.1.8 is outside the scope of the case and thus moot plaintiffs will provide **new conclusive evidence** showing how AT&T counsel **intentionally misled** Judge Bassler and Judge Wigenton's Court many times and engaged in an intentional **cover up**, regarding which obligations transfer. Traffic only transfers are routine under 2.1.8 but AT&T **can't provide evidence** to support its claim to Judge Bassler that customer plan obligations transfer on traffic only non-plan transfers that it first asserted to Judge Bassler because no evidence exists. It was simply an intentional scam on the NJFDC and the FCC in 2006.

## The FCC Determined D.C. Circuit Decision was Not a Remand and 2007 FCC Order determined Judge Bassler's 2.1.8 Referral is Moot as it is Outside Scope of Case.All Issues Resolved Equals Moot Case

17) AT&T claimed DC Decision was not a remand and Judge Bassler questioned that. Pgs. 4 & 5

15 THE COURT: Let me just stop you there for a minute.
16 I think there's some loose language in one of your
17 briefs where -- I don't have the page number in front of me,
18 where you say the DC Circuit remands the case to the FCC. **I**
19 **don't see any language of remand**.
3 THE COURT: You don't think the DC Court knows how to
4 use the word "remand?"

18) Plaintiffs spoke to D.C. Circuit Counsel and staff **Exh AA** and it said that if AT&T wasn't happy with the decision against it and the fact that it was not a remand, it was incumbent upon AT&T to appeal. DC Circuit said its 2005 decision shows it wasn't a remand: 1) it would obviously say remand 2) the referred question was answered. Referred question:

> DC Circuit pg 5 para 2: The specific question referred to the FCC was "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction".

19) The FCC was not asked to interpret obligation allocation under 2.1.8 but correctly did anyway agreeing with Plaintiffs, AT&T and the NJFDC Judge Politan's Decisions. 3) DC Decision stated obligations allocation was "beyond scope of our decision" because it was never referred to the FCC

and therefore not reviewable by DC Circuit. The DC Circuit can't remand obligation allocation as **it was not referred to the FCC** as the DC Circuit **can't remand** what it can't review 4) DC Decision states it addressed the original Third Circuit question and thus any other questions are moot to what was referred. Exh O **D.C. pg. 10 fn1**

> The Communications Act **precludes us from addressing only those issues which the Commission has been afforded no opportunity to pass."** 47 U.S.C. Section 405(a). It does not prevent us from considering "whether the **original question** was correctly decided," MCI v FCC, 10 F3d 842, 845 ( D.C. Circ. 1993), or whether the FCC "relied upon faulty logic." Nat'l Ass'n for Better Broadcasting v. FCC 830 F2d 270, 275 D.C. Cir. 1987). The analysis recounted above speaks to the soundness of the Commission's ruling on **the question initially presented**, and not to any novel legal or factual claims."

20) If Judge Bassler definitely knew it was **not** a remand it's axiomatic that he would have understood the Third Circuits referral resolved. The FCC's Counsels also advised plaintiffs that the DC Decision was not a remand. Judge Bassler was **never presented** this evidence at **Ex Z.** Consistent with the FCC's determination that the DC Circuit Decision was not a remand the FCC's 2007 Order advised the NJFDC that the 2006 referral on obligation allocation under 2.1.8 is "outside the scope of the case and thus moot. AT&T's **only** defense as the FCC 2003 Decision states was AT&T's **2.2.4** fraudulent use defense so all AT&T's 2.1.8 defenses were banned by FCC's 2007 Order. Sole defense: FCC 2003 Pg.10 para 13. **EXH A**

> "Because AT&T did not act in accordance with the **"fraudulent use"** provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. **AT&T does not rely upon "any other provisions of its tariff" to justify its conduct."**

Key point: AT&T had one defense (fraudulent use) under section 2.2.4 of AT&T's tariff. AT&T raised no defenses under the transfer section 2.1.8 or any other tariff provision. AT&T in 1995 conceded the proper obligations were being transferred under 2.1.8—it was simply the amount of revenue that was being transferred from 28% to 66%. AT&T did not want to provide additional discounts so it came up with a bogus fraudulent use defense. It was in essence "about the money."

21) Judge Bassler's 2006 referral deals with AT&T's defenses regarding 2.1.8; however the FCC 2007 Order does not expand the scope of the 2.2.4 fraudulent use issue previously presented by the Third Circuit referral. The FCC's Jan 12th 2007 decision makes Judge Bassler's 2006 referral on 2.1.8 obligation allocation issue moot as it does not expand AT&T's original **2.2.4** fraudulent use defense. The FCC 2007 Order explicitly advises the NJFDC to see fn13 as the parties' agreed upon obligations comments. The FCC's position is the 2006 referral on obligations allocation is moot. It doesn't need to rule as per the Administrative Procedure Act as there's no controversy or uncertainty. **Exhibit B**

> "As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to **terminate a controversy or remove uncertainty**. When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to **assist the referring court** by resolving issues arising under the Act. That is our goal here. The district court's June 2006 order **does not expand the scope of the issue previously presented. Rather,** we have been asked to interpret the scope of section **2.1.8** of AT&T's Tariff No.2, a matter **already extensively briefed by the parties**."
> **FCC Jan 12th 2007 Order Pg. 2 para 3 Exhibit B**

22) Judge Bassler's 2006 referral focusing on 2.1.8 obligations issue does not expand the scope of the **previous issue** which was AT&T's sole fraudulent use defense under section 2.2.4, **not 2.1.8.** In 1995 AT&T had no defenses as per 2.1.8., so the FCC 2007 Order correctly decided AT&T's 2.1.8 defenses created 11 years after the CCI-PSE transfer were not within the scope of the case. The FCC was ruling that AT&T can't create new defenses 11 years after the case started as the reason why it denied the transfer in 1995. In order to assert its 2.2.4 fraudulent use defense **AT&T conceded in 1995** that under 2.1.8 CCI would keep its customer plan obligations and raised zero defenses in regards to not adhering to 2.1.8.

23) The FCC's Jan 12th 2007 Order advised the parties that Judge Bassler's 2006 "obligations allocation" order **on 2.1.8** is a matter already "extensively briefed" by the parties. The FCC 2007 Order even lists at fn.13 all parties' comments which agreed that CCI must keep its customer plan obligations under 2.1.8. The FCC advised if there was active relevant obligations allocation issue pending the FCC obviously would not within the FCC's 2007 Order provide legal advice at fn13 to the parties as to where to find obligation allocation answers **if** it was a relevant pending issue! Of course it is not a pending issue! The FCC's position is Judge Bassler 2006 referral does not expand the already decided Third Circuit referral.

24) The very basis of AT&T fraudulent use assertion under 2.2.4., concedes customer plan obligations don't transfer from CCI and asserts CCI will never be able to meet its revenue commitment! AT&T had no defenses as per 2.1.8. AT&T's filing of Tr8179 was an attempt to force plaintiffs **to transfer the entire plan** on large traffic transfers, so as to force CCI to transfer the customer plan obligations. The reason AT&T can't provide this Court any evidence is because there is no option to transfer traffic only and transfer the customer plan obligations.

> "Specifically, the Commission was asked to determine "whether section 2.1.8 [of AT&T's Tariff FCC No.2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring **the plan** itself in the same transaction." Ex Jan 12th 2007 Order Pg. 2 Para 2

25) The Third Circuits 1996 referral made the FCC interpret whether plaintiffs could transfer traffic without the plan due to the percentage of accounts being transferred that AT&T claimed violated 2.2.4 fraudulent use—**not 2.1.8.** If AT&T suspected fraudulent use did it use 2.2.4 correctly or did it use an illegal remedy? If AT&T's 2.2.4 fraudulent use defense was found valid

that simply would mean plaintiffs would have been forced to transfer away its entire grandfathered plan with all of the account but the accounts would still get 66%.[1]

26) The FCC 2007 Order stated: "**Rather** we have been asked to interpret the scope of section 2.1.8" **"Rather,"** because initially in 1995 **AT&T had conceded plaintiffs strictly adhered to 2.1.8;** the FCC only needed to address 2.2.4 fraudulent use. There was no question before Judge Politan as to whether on traffic only transfer customer plan obligations should also transfer under 2.1.8., as AT&T of course was asserting its 2.2.4 fraudulent use defense that obligations don't transfer. See Fraudulent use.**Exhibit C**

27) Obviously NJFDC Judge Politan in 1995 wouldn't have had before his Court AT&T **simultaneously** asserting (revenue and time commitments) **don't transfer** (under AT&T's 2.2.4 fraudulent use defense) and **must transfer** (AT&T's post 2006 "all obligations" 2.1.8 defense)! The fundamental basis of the two AT&T arguments is the exact opposite! Of course AT&T was not asserting "all obligations transfer on traffic only transfers. It was asserting that "all obligations only transfer on PLAN transfers. Additionally AT&T obviously couldn't have been simultaneously asserting to Judge Politan that PSE was violating 2.1.8 by **refusing to assume customer plan obligations** as per AT&T's 2005 minted zero obligations were transferred assertion; when AT&T was actually asserting under its 2.2.4 fraudulent use defense that PSE **was not obligated** to assume customer plan obligations as those obligations are CCI's to meet!

[1] AT&T advised Judge Politan that if plaintiffs transferred its plan to PSE then AT&T would have allowed the PSE to then move the end-user accounts from 28% plan to the 66% plan because the liability would be under one company; however plaintiffs would have given up its grandfathered plan. So the case is not only moot under 2007 Order as AT&T's defenses were eliminated but ***even if*** AT&T won its fraudulent use defense that just meant plaintiff's would still have been able to get the 66% on the end-user accounts.

> "Indeed, **AT&T's own counsel** focused the issue by indicating that the tariffed obligations "*involved herein*" are all **tariffed obligations**, for which **"CCI, not PSE"** would be obligated. (Politan March 1996 pg.17 fn. 7) **EXHIBIT D**

28) Since the district court's June 2006 order "**does not expand the scope of the issue previously presented" AT&T's only defense is the defeated and not remanded fraudulent use defense. Case over.** AT&T's fraudulent use defense under 2.2.4 was knocked out by the FCC due to an illegal remedy. FCC Counsel Austin Schlick and John Engle advised plaintiff's that the DC Decision was **not a remand** because the issue the FCC was asked to determine (whether AT&T's only defense (fraudulent use 2.2.4) could prevent traffic only from transferring and that was not remanded by D.C. Circuit. AT&T's fraudulent use defense can't be determined differently even if the FCC or the D.C. Circuit were to rule on it again.

29) If an appellate court (here D.C. Circuit) has not decided a legal question and the case goes to a lower court (here FCC) for further proceedings**, the legal question, (fraudulent use) not determined by the appellate court (D.C. Circuit ) will not be differently determined on a subsequent appeal (Judge Bassler Referral) in the same case where the facts remain the same.** *Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303. Additionally an appellate court's determination on a legal issue is binding on both the trial court and FCC **and an appellate court ( DC Circuit) on a subsequent appeal** given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607. (So even if the case were a remand both the FCC and DC Circuit by law must find that AT&T used an illegal remedy on fraudulent use so the case is moot. AT&T's fraudulent use position is based upon customer plan obligations ( the plans revenue and time commitments) not transferring and thus is the same as plaintiff's and answers Judge Bassler's 2006 referral.)

30) The FCC correctly took the position that Judge Bassler's 2.1.8 obligations allocation referral is outside the scope of the case and therefore the **declaratory ruling is not necessary** and so the FCC has not ruled. AT&T's only defense 2.2.4 was not overturned by DC Circuit. The 2007 order states there is no **controversy or uncertainty** on obligation allocation so Judge Bassler's 2.1.8 referral on obligation question is moot. If the DC Circuit Decision was a remand, the FCC would have come out with another decision within 1 year. It is now almost 11 years from the 2005 DC Circuit Decision. The Third Circuit Referral is not a remand. It has been completed.

## AT&T's Sole Defeated Defense of Fraudulent Use 2.2.4 is Also Meritless— AT&T Counsels Disregarded the NJFDC Position that the Plans were Penalty Immune

31) AT&T's 2.2.4 fraudulent use defense is also meritless as the law of the case before NJFDC Judge Politan is the plans were ordered prior to June 17th 1994 and thus were penalty immune.

> A) Judge Politan: **"**Suffice it to say that, with regard to **pre-June, 1994 plans**, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff." District Court Joint Appendix pg. 66
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> B) Judge Politan: "Commitments and shortfalls are little more than **illusionary concepts** in the reseller industry—concepts which constantly undergo renegotiation and restructuring. The only "tangible" concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that **AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction **nor properly substantiated by AT&T**. March 1996 Politan Decision (page 19 para 1)
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> C) Judge Politan: "In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do **escape termination and also shortfall charges** through renegotiating their plans with AT&T."

Judge Politan after 2 day hearing clearly understood the plans were grandfathered and thus immune from shortfall and termination penalties. AT&T never came back to Judge Politan to substantiate that it should be entitled to $15 million dollars. AT&T simply unlawfully applied the charges to put plaintiffs out of business.

32) The June 17th 1994 immunity provision is **prior** to the Jan 1995 traffic only transfer. AT&T should not have even been able to assert a fraudulent use defense that it would be deprived of collecting shortfall charges on CCI's remaining customer plan obligations, as Judge Politan found CCI's/Inga's plans were immune from shortfall and termination liability. **Exhibit E** On merits alone AT&T shouldn't have been able to argue fraudulent use. The FCC also noted that the plans were ordered prior to 6.17.94 agreeing the plans were penalty immune.

FCC's 2003 Decision pg. 2 para 2:

> "**Prior to June 17, 1994**, the Inga Companies completed and signed AT&T's "Network Services Commitment Form" for WATS under AT&T's Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T's regular tariffed rates."

AT&T's sole meritless fraudulent use defense was FCC denied and not remanded by the DC Circuit. Its merits should have never have been allowed to be asserted in the first place. There is no merit to AT&T suspecting being denied of shortfall charges on CCI's plans when Judge Politan understood CCI's plans--- that were transferred to CCI from the Inga Companies ---were pre June 17th 1994 immune from these charges. That is why in AT&T's settlement with CCI AT&T paid substantial cash PLUS waived the $80 million in bogus charges. Obviously the $80 million was waived because the charges were unlawful to begin with! Obviously AT&T has already conceded it damaged co-plaintiff CCI for denying the traffic transfer in Jan 1995 and then unlawfully placing charges on the plans in June 1996. This is for the **same exact AT&T tariff violations the 4 Inga co-plaintiffs companies suffered.** AT&T/CCI settlement agreement here at **Exhibit BB.**

## Any AT&T Defense Is Barred Due to Statute of Limitations within 2.1.8

33) Even if 2.1.8 was not banned by FCC's Jan 12th 2007 Order all AT&T defenses are moot as AT&T failed the 15 day statute of limitations under 2.1.8. AT&T knew the 15 days was a statute of

limitations date otherwise AT&T wouldn't have felt it mandatory to intentionally mislead the DC Circuit that it had denied the transaction on Jan 27th 1995.

34) AT&T misrepresented to Judge Politan in 1995 that the 15 day clause within section 2.1.8 transfer section was not a statute of limitations date. After the second Judge Politan decision in 1996 AT&T made language modifications to section 2.1.8 and clarified that the 1995 version of 2.1.8 that governs the CCI-PSE transaction was indeed a hard statute of limitations date. When AT&T makes changes in its tariff it must notate along the right hand side whether the language modification was a CLARIFICATION of previous versions and thus confirming there is no change in the terms and conditions of section 2.1.8. If the language modification was a change in the terms and conditions then that language modification would be designated along the tariff page margin as a CHANGE in the terms and conditions and of course all changes in terms and conditions is prospective. Judge Politan was simply lied to by AT&T counsels. At the time plaintiffs did not know either.

35) The orders were placed Jan 13th 1995 and AT&T's first correspondence was February 6th 1995 ---outside the 15 days ---and even that AT&T letter was not a denial—it was a 2.2.4 fraudulent use **warning.** AT&T lied to the DC Circuit in 2005 that it denied the CCI-PSE transfer on Jan 27th 1995. Remember by 2005 the tariff had already been clarified that this was a hard 15 day statute of limitations date so AT&T counsels need to lie to the DC Circuit otherwise all defenses would be precluded. Obviously AT&T did not first deny the transaction on Jan 27th 1995 then issued only a warning on February 6th 1995! AT&T Counsel Fred Whitmer initial fraudulent (2.2.4) use warning letter to Mr Inga February 6th also conceded the plans remain intact with their commitments as per the tariff. **EXHIBITS F**

> "Mr. Inga's efforts to transfer these end users and **leave the plans intact with their commitments**, AT&T will seek to enforce its rights **in the event shortfall and termination charges become due under the tariff** and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its **tariff charges."**

36) AT&T clearly understood it needed to meet the 15 days statute of limitations otherwise all AT&T defenses would be precluded so it simply lied to the DC Circuit. If the 15 days was not a statute of limitations date there was absolutely no reason to advise the DC Circuit of AT&T's alleged denial date! Judge Politan's first decision in May of 1995 on page 10 indicates AT&T initially contacted the FCC to introduce Tr8179 on February 16th 1995; which of course is also

outside the 15 days statute of limitations date. AT&T clearly understood that plaintiff's transaction **explicitly adhered to section 2.1.8.** [2]

37) Plaintiffs in October 2015 emailed AT&T along with all FCC Commissioners and many FCC Counsels and requested that the 8 AT&T counsels that are on AT&T's brief to the DC Circuit produce evidence of AT&T's alleged Jan 27th 1995 denial of plaintiffs Jan 13th 1995 traffic transfer. These public comments have been uploaded to FCC server. AT&T of course did not respond and in fact when asked to confirm receipt of plaintiff's emails AT&T counsel Richard Brown only responded to plaintiffs. Mr. Brown did not want the FCC to see that AT&T had received plaintiffs evidence request in hopes that the FCC may believe AT&T may not have received plaintiffs email. AT&T's failure to deny the CCI-PSE transaction within 15 days precludes all defenses and this means the case is over on this AT&T misrepresentation alone. AT&T counsels no doubt intentionally scammed Judge Politan, the FCC and D.C. Circuit Court.

**The NJFDC Referral is also Moot as AT&T's Own Defense Would Mean Plaintiff's Had No Obligations Left to Transfer Due to Previous Traffic Only Transfers From Plans**

38) Plaintiffs did many traffic only transfers away from its plan previously to the denied Jan 1995 transfer. Under AT&T's "all obligations" theory that "all obligations" transfer, that would mean there were no obligations left to transfer in Jan 1995. So how can AT&T have claimed in Jan 1995 that plaintiffs were supposed to also transfer customer plan obligations when under AT&T's post 2006 bogus assertion---there were no obligations left to transfer! AT&T's "all obligations" defense created in 2006 is self-defeating. If the obligations were still left after prior traffic transfers that means AT&T's theory that all obligations transfer is wrong. If AT&T's theory is correct and all obligations did transfer then why was AT&T asserting fraudulent use that it would be denied of shortfall on obligations that had already been transferred away? How can AT&T assert that CCI had

[2] AT&T filed Tr8179 on February 16th 1995 in a FCC pleading that it had the right to force the entire plan and all of the accounts to transfer –which is the only way to force the plan commitments to transfer. The FCC advised AT&T that its Tr8179 pleading did not have the right to force an entire plan transfer when only end user traffic was transferred and not the plan—no matter how many end-user accounts were transferred.

to transfer all obligations if there were no obligations left to transfer since they were all transferred away prior to Jan 1995? That is what happens when you lie—the pieces don't fit. Either way the case would therefore be moot under AT&T's "all obligations" scam.

## Discrimination Issue Also Makes the Case Moot

39) Judge Bassler stated plaintiffs have a discrimination claim as AT&T allowed other customers to do traffic only transfers under 2.1.8 but it denied plaintiffs. See several certifications of other AT&T customers all stating customer plan obligations don't transfer on traffic only transfers. **EXHIBITS G---L** The FCC 2003 Decision **EXHIBIT A** states **the NJFDC should resolve discrimination** at Pg13 FN87.

> FCC Decision page 13 FN 87**:** For example, petitioners claim that AT&T engaged in unlawful **discrimination in violation of section 202 because its consistent practice was to permit aggregators to transfer locations without plans**…….**Assuming that further inquiry is appropriate, efficiency favors their resolution in the district court where the evidentiary record already has been developed.**

40) AT&T allowed others the same exact 2.1.8 traffic only transfers and a future FCC case is moot.[3]

> Judge Bassler's Court: What the FCC is saying there, there's a question of unlawful discrimination. They've already decided the question of interpretation, but the plaintiffs put another issue in front of them. They said to the extent we're supposed to transfer all these obligations under 2.1.8. **AT&T has allowed thousands of other transfers to go through where they didn't require that**. That's a form of discrimination under Section 203. (Oral Pg. 20 line 22)

41) Just Bassler was not understanding that the reason why AT&T allowed the traffic transfers under 2.1.8 w/o the plan obligations transferring was because that is what its tariff mandates. AT&T's sole defense was 2.2.4 due to the size of the transfer. But 2.1.8 does not mandate any difference in the type of obligations that get transferred based upon how much traffic is transferred.

[3] AT&T also discriminated by not giving plaintiff's a contract tariff that it qualified for. **EXHIBIT M**

NJFDC Judge Bassler did not need the FCC to interpret which obligations go where anyway. Judge Bassler could have simply ruled that AT&T was allowing other customers to transfer traffic without the plan and none of them ever had to transfer the customer plan obligations. Judge Politan's decision states that all the evidence favors plaintiffs and no evidence has ever been presented by AT&T. The FCC's brief to the D.C. Circuit states that AT&T has never produced any evidence and in fact the FCC cites Politan statements regarding AT&T having zero evidence. Anyone can simply call any AT&T executive and ask: In the history of AT&T has AT&T ever required a customer that is only transferring accounts but NOT the plan to also transfer the non-transferred plans revenue and time commitment? The answer is: No since AT&T toll free service started in 1967 to today these obligations don't transfer. AT&T lied to Judge Wigenton by advised her that AT&T has already addressed plaintiff's evidence argument at the FCC. AT&T counsels understood it had no evidence because none exists so AT&T misled Judge Wigenton. Judge Bassler could have simply found AT&T discriminated against plaintiffs, as the FCC advised NJFDC that this is an issue NJFDC must handle.

42) AT&T also discriminated against plaintiffs as AT&T compensated former co-plaintiff CCI in cash and CCI did not pay AT&T about $80 million of alleged charges for the damages CCI suffered on the exact same transaction as plaintiff. AT&T now claims that only former co-plaintiff CCI was damaged but remaining plaintiff was to receive 80% and CCI only 20% of the additional compensation. Plaintiffs suffered substantially more damages than co-plaintiff CCI on the exact same transaction yet CCI is compensated and AT&T claims the Inga companies have no claims.

**The FCC Case Is Also Moot Due to Changes in the Terms and Conditions of Tariffs are 15 Days Prospective and Previous Transactions Are Grandfathered**

43) The FCC 2007 Order eliminated 2.1.8 issues but ***even if*** a future FCC Decision was issued on 2.1.8 it would be is moot. AT&T can't change 2.1.8 retroactively for all AT&T customers as noted by the FCC 2003 Decision. The FCC confirmed future tariff changes are moot. Pg. 11 para 14

> We also do not understand AT&T to argue that **any revisions to its tariff that became effective after January 1995** govern resolution of this matter.

44) So ***even if*** in the future the FCC were to change the terms and conditions of 2.1.8 and force all AT&T customers to transfer the customer plan obligations on traffic only transfers it would be 15 days prospective and the CCI-PSE transaction is grandfathered. The FCC's 2003 Decision states the 1934 Communications Act law covers the 1995 transaction and the Act is explicit:

> Any other tariff filed pursuant to section 204(a)(3) of the Communications Act, including those that propose a rate increase or **"any change in terms and conditions", shall be filed on 15 days' notice.**

45) Even if 2.1.8 was not banned per the 2007 Order, the case would be moot as any 2.1.8 changes in terms and conditions are prospective. Thus the CCI-PSE transaction is grandfathered as Judge Politan predicted in his March 1996 Decision.

> **From:** Deena Shetler [mailto:Deena.Shetler@**fcc.gov**]
> **Sent:** Friday, December 05, 2014 9:40 AM
> **To:** 'Al'; Randolph Smith
> **Subject:** RE: Deena & RL -- General procedural question....
>
> "a new tariff filing or a tariff filing that that **changes the terms of an existing tariff is effective prospectively**. Each such filing will have an effective date."

46) AT&T's **only defense** of fraudulent use under 2.2.4 takes plaintiff's position and that of the NJFDC Decisions and FCC's 2003 Decision that revenue and time commitments **do not transfer and answers Judge Bassler's referral.** AT&T, as confirmed by the 2007 FCC Order, had no defenses under 2.1.8., at the time of the 1995 transaction. In 2005 before the DC Circuit AT&T continued to agree with plaintiffs when advising the DC Circuit "all obligations" **depended upon** what was transferred not that all obligations must always transfer as AT&T first minted in 2006 to Judge Bassler! AT&T counsel David Carpenter at oral argument:

> JUDGE ROBERTS: Why not? The **tariff says** they have to **assume all the obligations**.
> Carpenter: Yes, **but what it means** to assume **all the obligations.** What obligations **apply** may vary **depending on what's transferred**. (11/12/04 DC Circuit pg.12 Line 22)

> Mr. Carpenter: Now what obligations they are going to end up assuming **will vary depending** on what service is being transferred. **(11/12/04 DC Circuit ORAL Argument pg.12 Line 12**
>
> AT&T Counsel Carpenter during Third Circuit Oral: We point out in our brief that there's a **distinction** between transfers of **entire plans**, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (Pg 15 line 9)

47) AT&T's brief to the DC Circuit explicitly stated its position that under section 2.1.8 a transfer of end-user traffic can be done ***without*** the associated liabilities. AT&T reply brief pg 9:

> Section 2.1.8 "addresses" the transfer of end-user traffic ***without*** the associated liabilities.

The FCC 2003 Decision used 2.1.8 to interpret which obligations transfer the FCC did not see that 2.1.8 allowed traffic only transfers. However the FCC did agree with **AT&T's 1995-2005 claim** that traffic transfers "**without the associated liabilities.**" The FCC agreed with the NJFDC Decisions that customer plan obligations don't transfer unless the plan transfers.

AT&T counsel Whitmer detailed PSE does not need to assume plaintiff's obligations when AT&T was asserting its "Fraudulent Use" defense on 3/21/1995 cross examination of Mr. Inga:

> Whitmer: Q: Mr Inga, you know, do you not that if the service, **except for the home account**—or Mr. Yeskoo called it the **"lead account**" ---is transferred to PSE **the shortfall and termination liabilities remain** with Winback & Conserve, **isn't that correct?**
> Inga: Yes

48) The 9 AT&T TSA Order forms at **EXHIBIT N** kept the home lead account on the plan so the plan and customer plan obligations did not transfer. Plaintiffs understood how 2.1.8 worked. AT&T's only issue with CCI-PSE transfer was the size of the transfer asserting it was a **2.2.4** fraudulent issue

not a 2.1.8 issue. The DC Decision **EXHIBIT O** understood that under the tariff CCI would keep the customer plan obligations which the Court erroneously referred to as "burdens."[4] D.C. pg. 9

> In so doing, CCI asked AT&T to move nearly all the services — all the benefits —associated with its CSTP II plans. What was left behind were **CCI's obligations** — the **burdens** under the plans.

49) DC Circuit Judges Tatel and Ginsburg both understood "all obligations" don't transfer unless the whole plan is transferred: D.C. Oral Argument Page 10

> JUDGE GINSBURG: Well, you said "all obligations".
> JUDGE TATEL: Well, that's **only if the whole plan is transferred.**

DC Circuit Judge Ginsburg understood CCI keeps its customer plan obligations but understood the plans were 6.17.94 penalty immune and completed the FCC's counsels' question (Pg. 27 Line 2):

> MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this** that the **Commission didn't rule on.** I mean, for instance --
> JUDGE GINSBURG: Whether they were **grandfathered?**
> MR. BOURNE: **Right.** So it could well be that there were little or **no shortfall charges**.

50) The FCC itself again confirmed during oral argument that CCI keeps obligations and notes plans ordered prior to 6.17.94. Therefore the plans could avoid shortfall penalties and thus this also addresses AT&T's sole defense of 2.2.4 fraudulent use where AT&T claimed it was going to be in a position where it could not collect shortfall as CCI MUST KEEP THE CUSTOMER PLAN COMMINTIMENTS. AT&T of course intentionally scammed Judges Bassler and Wigenton as it got rid of all its old counsels to come up with its scam in 2006 that "all obligations" transfer. Of course AT&T counsels could not present any evidence to support it's "all obligations" must transfer fraud because none exists.

[4] The plans with little accounts on them were still a major asset worth many millions it was not a "burden." Judge Roberts unlike Judge Ginsburg did not take into consideration that the CCI plans were pre June 17th 1994 grandfathered penalty immune. Additionally the plans did not require tens of millions of security deposits when upgrading.

**PSE is Only Responsible for Assuming All Obligations of the "FORMER" Customer**

51) **New evidence** shows AT&T intentionally misled Judge Bassler and this Court. (See 2.1.8 language **Exh A pg.6fn.46**) **The day after plaintiffs filed 2.7.2007 at the FCC plaintiffs tariff analysis (EXH P) AT&T counsel understood the "jig was up" and Mr. Brown called to ask how much plaintiff's wanted in settlement.**

52) Under 2.1.8., PSE is **only obligated** to assume "all obligations of the **former** customer." On a traffic only transfer CCI does **not** become a **former** AT&T customer of its plan as CCI keeps its AT&T plan and remains an AT&T customer—not a **former** customer. As an AT&T customer (not a **former** AT&T customer) CCI must meet its customer plan obligations (plans revenue and time commitment) and not transfer them away.

53) Simple---The **former** customer is only a **former** customer on the service (traffic or plan) that it transfers. Since PSE is only obligated to assume all obligations of the "**former** customer;" CCI is not a **former** customer of its CSTPII/RVPP plan, nor is it a former customer of any end-user accounts that it doesn't transfer away. As per the CSTPII/RVPP definitions CCI must maintain its revenue and time commitments and thus the associated liabilities for shortfall and termination liability.

54) Likewise the former customer CCI is **not** a former customer of the end-user accounts that were not transferred-- that it kept. So obviously the new Customer (PSE) would not be obligated to pay bad debt on end user accounts that PSE doesn't receive from CCI.

55) **PLAN TRANSFER DIFFERENCE:** When the Inga Companies initially transferred its **entire plans** with all end user accounts to CCI; the Inga Companies of course became **former** AT&T customers of its whole plan! The Inga Companies were no longer an AT&T customer

they were a former customer. Therefore CCI must assume all obligations of the FORMER customer and thus absolutely CCI did have to assume the Inga Companies **plans** revenue and time commitments and shortfall and termination liability.

56) Three months after plaintiffs filed with the FCC its "former customer" tariff analysis, AT&T responded with an absolutely comical response. AT&T asserted the **former** AT&T customer, that by definition has **no AT&T service**, is defined as the Customer. Obviously the Customer is defined as a former customer on what service is transferred and PSE must assume all obligations **on the service transferred**. Of course the AT&T customer becomes a former customer on service it transfers. Subsequent versions of section 2.1.8 after Jan 1995 also confirmed the meaning of word "former" in the Jan 1995 version of 2.1.8. English Professor Roth teaches lesson here: **Exhibit Q.**

## AT&T Lost Its Only Fraudulent Use Defense and Raised New "All Obligations" Scam on Judge Bassler and Engages in *Cover-Up* to Deflect Attention from "Former Customer"

57) When AT&T lost its sole fraudulent use defense under section 2.2.4, AT&T created a new defense under 2.1.8 that had never been heard before. The original defeated defense of fraudulent use took the position that customer plan obligations don't transfer on 2.1.8 traffic only transfers. AT&T's new defense created 11 years into the case in 2006 2.1.8 took the position for the first time before Judge Bassler that customer plan obligations must transfer after DC Circuit. Mr. Brown to Third Circuit 1996 said it was **self-evident** customer plan obligations **don't transfer** then in 2006 before Judge Bassler that these obligations **must transfer**. Apparently if AT&T pays Mr. Brown enough he's willing to scam any Judge his client AT&T tells him it needs to scam.

58) Despite DC Circuit Judges Tatel and Ginsburg understanding that customer plan obligations don't transfer it was Judge Robert's who wrote the D.C. Circuit Decision and he was really confused as to which obligations transfer for traffic only transfers under 2.1.8. AT&T figured since Judge Roberts appeared confused let's confuse Judge Bassler with the same failure to recognize the word FORMER customer within 2.1.8.

> ROBERTS, *Circuit Judge*: AT&T Corporation petitions for review of a Federal Communications Commission order interpreting AT&T's tariff on resales of 800 telephone service. A provision of that tariff allows resellers to transfer their business, **"**so long as the recipient assumes **all of the transferor's obligations."** DC Circuit Page 2:

59) Look at the actual language of section 2.1.8 at Exhibit A Page 6 FN 46 paragraph B of the FCC 2003 Decision. It's not "all of the **transferor's obligations**," it's all obligations of the "**former"** Customer! FORMER CUSTOMER NOT TRANSFEROR. Simple--The word "former" is an adjective that modifies the noun. Despite AT&T counsel David Carpenter having explicitly told Judge Roberts what obligations transfer depends upon what is transferred, Judge Roberts was still totally confused. AT&T saw Judge Robert's confusion so AT&T only focused Judge Bassler on just the two words "all obligations" and not the full sentence that Judge Roberts not only failed to focus on but didn't consider any case evidence!

60) To pull off the fraud on Judge Bassler AT&T intentionally misquoted section 2.1.8 and misquoted the actual words "former customer." Dozens of misquotes in the briefs. Few here:

> 1) "Thus, the second sentence of § 2.1.8B did not limit the sweepingly broad requirement that a **transferee** accept "all obligations" of the **transferor**."
> 2) the `new' customer in the transfer, did not assume all the obligations' of the **`old'** customer, CCI,"
> 3) "whether a proposed transfer of virtually all end-user WATS traffic, without a transfer of "all obligations" of the **transferor,** complies with § 2.1.8."
> 4) "ARGUMENT I. SECTION 2.1.8 REQUIRES A **TRANSFEREE** TO ACCEPT "ALL OBLIGATIONS" OF THE **TRANSFEROR** COMPANY, INCLUDING ANY OBLIGATION TO PAY SHORTFALL OR TERMINATION CHARGES."
> 5) "whether a **transferee's** refusal to accept all of a **transferor's** obligations satisfies § 2.1.8."

There was no other reason for AT&T counsels to dozens of times misquote 2.1.8 unless it was an intentional attempt to deceive the NJFDC and the FCC.

61) If you notice the AT&T misquotes above at 1), 4) and 5) AT&T also changed the words "new customer" to "transferee's" to kind of **balance it out** ---because the scam plays better if consistent comparable words are used like **transferee and transferor.** AT&T knew it would sound odd to change only "former customer" to "the transferor" without also changing the actual tariff words "new customer" to the misquote "the transferee!" AT&T's belief was since we are going to try and pull off this scam let's go all the way to make it sound better. In the number 3) misquote AT&T doesn't quote "new customer assumes" it very conveniently just picks up sentence from "ALL OBLIGATIONS OF THE **TRANSFEROR** COMPANY" as it changes "former customer" to **transferor company**. AT&T counsels scam was to avoid anyone from recognizing the word "former". As usual the attempt to cover-up of the fraud proves the intent of the fraud.

62) Here is AT&T's Guerra working his "all obligations" scam on Judge Bassler pg. 4 of Oral argument. Notice how Guerra short quotes the full sentence down to only "all obligations".

> Guerra
> So then the DC Circuit said there's a question about
> what obligations have to be transferred. **The language is all**
> **obligations.** We thought the FCC hasn't ruled on that question

AT&T's short quote of the full sentence and **focus** on only the 2 words "**all obligations**" scam worked on Judge Bassler and thus the moot 2006 Referral was sent to the FCC:

> Oral Argument Pg. 13:
> THE COURT: I don't find much comfort in that because
> **the agency wasn't focused on the term, "all obligations."**

63) Thankfully the FCC 2003 Decision was not fixated on only 2 words of the sentence and agreed with Judge Politan's decisions as several AT&T counsels 1995 testimony was CCI must keep plan obligations under 2.1.8 see **Exhibit R**.

> The District Court noted in this regard that the record contained evidence that AT&T's past practice, "based on [AT&T's] own construction of its tariff language," had been to grant requests such as CCI's and PSE's, and that **AT&T had not "satisfactorily refute[d]" such evidence**. Second District Court op. at 15 & n.6

Judge Bassler disregarded Judge Politan's findings that plaintiffs submitted **evidence** and none by AT&T. These facts plus AT&T's deception caused Judge Bassler to unfairly discredit the FCC's position that customer plan obligations don't transfer on traffic only transfers. Judge Bassler did not take into consideration what AT&T's absurd "all obligations" position means in the real world.[5]

64) Judge Bassler never asked AT&T for evidence to support its "all obligations" theory and never questioned how AT&T could have been simultaneously claiming fraudulent use (under the tariff CCI obligations **don't transfer**) and that "all obligations" means all CCI obligations **must transfer**! Judge Bassler simply got scammed by AT&T lies and tariff misquotes. Remember during Judge Bassler case plaintiffs had not yet discovered the "former customer" tariff meaning until 2007 after the case was sent to the FCC.

65) Judge Bassler also made an error in not understanding the FCC's only task was determine fraudulent use. Judge Bassler also did not recognize that the FCC used section 2.1.8 to interpret which obligations transfer. Even though plaintiffs used section 2.1.8 to transfer accounts the FCC 2003 Decision stated the movement of just accounts was not allowed under 2.1.8 but since section 3.3.1.Q allows CCI to delete accounts and PSE to add the accounts, the tariff does not prohibit just accounts to transfer. AT&T CSTPII/RVPP Definitions bullet 4 stated:

> **"The Customer may add or delete an AT&T 800 Service or AT&T 800 Service covered under the plan."** **See EXHIBIT S**

[5] AT&T's post 2005 "all obligations" short quote of the full sentence would mean: If Company A transfers 300 accounts of its 10,000 accounts to Company B, the Company B should not only assume the bad debt on the 300 accounts received---- BUT according to AT&T's "all obligations" nonsense, the new customer incredibly must also assume the BAD DEBT on the 9,700 **accounts that were not even transferred to Company B!** Absurd! Furthermore AT&T's "all obligations" nonsense asserts that Company A with a revenue commitment of say $100 million can **get rid of** its entire $100 million revenue and time commitment by transferring away with a few accounts with $200 in usage from its plan and then take the $100 million in customers traffic and leave AT&T! That's why you can't transfer customer plan obligations away on a traffic only transfer.

66) The FCC used 2.1.8 to interpret obligations. Section 3.3.1.Q CSTPII/RVPP definitions **(EXHIBIT S)** doesn't even have obligations allocation language that deals with traffic only transfers. So Judge Bassler couldn't possibly have believed the FCC used 3.3.1Q as an alternative to interpreting 2.1.8. Remember the only task the FCC had to do was decide if AT&T could prevent the transaction based upon 2.2.4 fraudulent use. Judge Bassler was simply confused ---**justifiably so**---because of AT&T's deception. Judge Bassler didn't have the "former customer" tariff analysis as that was not discovered until after Judge Bassler's referral.

67) Also Judge Wigenton was not presented with either the Jan 12th 2007 FCC Order nor the "former customer" tariff analysis by plaintiffs former counsel. The CCI-PSE transfer was done per 2.1.8. The FCC actually treated the CCI-PSE transfer as a 2.1.8 transaction because plaintiff's had end-user authorization to move the accounts without getting a signature again. Pg. 5 line 4 FCC Decision:

> "comment on the nature of the relationship, if any, between AT&T and the end-user customers of AT&T's customers, under AT&T's Tariff FCC No. 2 generally, and specifically under the tariff provisions governing the RVPP and CSTP II Plans at issue in this matter."

68) The above FCC question was asked to see if plaintiffs had "customer control" of each end-user. Plaintiffs used 2.1.8 and evidenced the ability to "change service" **EXHIBIT T** without end-users signatures to get on PSE's plan. D.C noted the signature exemption benefit pg. 9 para 1.

> "as well as exemption from a requirement that resellers obtain their end-users' written consent prior to the transaction. See AT&T Br. At 21-23"

The FCC allowed the direct transfer without signatures "just like 2.1.8 allows," even though it didn't see in 2.1.8 that traffic only movement was permitted. The FCC actually treated the CCI-

PSE transfer movement just like 2.1.8. Section 2.1.8 allows for direct transfer but the **former** customer has to have authority to change service.

69) The FCC **explicitly advised** the DC Circuit that used **2.1.8** to interpret obligations allocation.

> **By contrast, when only traffic is moved,** the party reducing its traffic (in this case CCI) "would continue to subscribe to its existing CSTPII plans, and the totality of **the reciprocal obligations between that party and AT&T under those CSTPII plans would remain in effect**, both with respect to service that already had been purchased at the time the traffic was moved *and* with respect to any future service taken under the plans. *Order*, para 9 ( JA7). Thus, each method of structuring the transaction presents distinct benefits and **obligations** for both AT&T and the customer, and the Commission's reading **gives meaning to section 2.1.8.** (emphasis added)

70) "Gives meaning to section 2.1.8" relates to the fact that the FCC did not use 2.1.8 to decide **how the accounts could move**; 2.1.8 only had **meaning for its obligation language** to interpret obligation allocation, agreeing that the former customer CCI doesn't transfer its plan obligations to PSE because its plan is not transferring.

71) AT&T counsel Guerra misled Judge Wigenton at Oral argument that the FCC said 2.1.8 does not apply **at all.**

Mr. Guerra Page 8 Judge Wigenton Oral Argument:

> So the issue goes to the FCC and the FCC says 2.1.8 doesn't apply to this **at all** because it only applies to a transfer of a plan, and this isn't a transfer of a plan.

72) The FCC did not state that 2.1.8 transaction doesn't **apply at all.** Mr. Guerra clearly understood the FCC used 2.1.8's tariff language to interpret obligation allocation but in order to deceive Judge Wigenton he misled by saying **"at all"** to falsely assert that the FCC did not use 2.1.8 to already interpret which obligations transfer.

73) Mr. Guerra attempted to discredit the FCC's obligation analysis under 2.1.8:

Judge Wigenton Oral Argument AT&T counsel Guerra Page 11 para 8:

> In their reply brief they come back and they quote from a different part of the FCC's decision on page 7 of the decision, itself. And they say this shows that the FCC decided how the obligations should transfer. But the passage they quote comes shortly after FCC says this:
> "We conclude that Section 2.1.8 of AT&T's tariff did not address and therefore did not preclude or otherwise govern **the movement of end user traffic** from one aggregator to another as CCI and PSE sought to effectuate in this case."

74) Notice the FCC only said 2.1.8 does not preclude or otherwise govern **the movement of end user traffic.**" The FCC was only talking about how accounts can move under the tariff when saying that 2.1.8 didn't allow the "movement of end user traffic". However the FCC absolutely used 2.1.8 to interpret which obligations transfer and agreed with Judge Politan's decisions that used 2.1.8., to interpret obligations allocation. The FCC didn't say, as Mr. Guerra intentionally misled Judge Wigenton, that the FCC's position was 2.1.8 doesn't **apply at all**." The FCC's 2.1.8 obligations analysis was absolutely correct and explicitly detailed and agreed with AT&T and Plaintiffs obligations allocation before Judge Politan. FCC 2003 Decision:

> CCI and PSE retained the benefits **and obligations of their respective agreements** with AT&T. We note in this regard that both the forms submitted to AT&T and the agreement between CCI and PSE stated that **CCI would continue to subscribe to its existing CSTP II plans. Thus, CCI still would have to meet its tariffed commitments**, without the use of the traffic moved to PSE, and AT&T also would remain obligated to CCI under the terms of Tariff No. 2. **(FN 50)** The moved traffic would be used to meet PSE's CT 516 volume commitments and, once moved, would no longer be associated with CCI's CSTP II. If the traffic were moved away from CCI under Tariff 2, to PSE under Contract Tariff 516, AT&T would get less money for the same traffic – the traffic would be discounted 66 percent instead of 28 percent**. (FN 51)**
>
> **Pg7 fn50**: Under **2.1.8** Accordingly, at least theoretically, the traffic might have been returned to **CCI** at some point to enable it to **meet any CSTP II obligations**.
>
> **Pg 7 Footnote 51** under **header 2.1.8**;**"See First District Court Opinion at 5".**
> (3) CCI would continue to be responsible to AT&T for any commitments **associated with the CSTP II Plans** (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required **CCI to meet its commitments.**

75) AT&T counsels misrepresentation to NJFDC Judges Bassler and Wigenton that the FCC did not interpret 2.1.8 is obviously false. Again the FCC's task was only to interpret 2.2.4 Fraudulent use. That was AT&T's only defense. AT&T conceded 2.1.8 was being strictly adhered to in Jan 1995. AT&T

counsel introduced a red herring and then spun an incredible scam on NJFDC Judges Bassler and Wigenton.

## By Supreme Court Law The Stay is Lifted

76) The Supreme Court has set forth a two-part test for identifying a final agency action. "First, the action must mark the consummation of the agency's decision making process -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences flow.'" Bennett v. Spear, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed. 2d 281 (1997) (citations omitted). See also, Abbott Labs., 387 U.S. at 148-49, 87 S.Ct. 1507 (observing that the "problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration").

77) The FCC consummated its action from the Third Circuit referral and that was a final agency action ripe for review under the Administrative Procedure Act (APA) 5. U.S.C. s. 704, See Top Choice Distribs., Inc. v. United States Postal Serv., 138 F.3d 463, 466 (2d Cir. 1998). It had to be a final FCC action or it could not have been reviewed by the DC Circuit. DC Circuit simply decided section 2.1.8 as used by plaintiffs does allow traffic only transfers. The DC Circuit did not remand the only issue before the FCC of fraudulent use. It can only have been continued if (1) the court explicitly issued an order of remand; (2) the FCC decided to take the matter up on its own; or (3) one of the parties filed to ask for a clarification. **None of these things happened.** The FCC on Jan 12th 2007 simply accepted that 2.1.8 also allows traffic only transfers and not just plan transfers. So the FCC and DC Circuit both stated that the DC Circuit Decision was not a remand of the only issue the FCC was to interpret: 2.2.4 fraudulent use. This is why the FCC Jan 12th 2007 Order states that all AT&T defenses having to do with section 2.1.8 are outside the

scope of the case as those defenses were never AT&T's defenses in 1995. By law the stay should now be lifted and the damages phase scheduled.

78) The DC Circuit simply substituted its judgment of what AT&T's tariff meant for that of the FCC's regarding "account movement under 2.1.8" and thereby declared the law on the issues presented. So there's nothing for the FCC left to do on these issues as stated by the FCC's Jan 12th 2007 Order. So the DC Circuit and FCC Office of General Counsel said there is **no remand** as to the issues **the DC Circuit Court itself determined.** The Court determined the one issue that was asked – could traffic only transfer without the plans and the DC Circuit did not find fault with the FCC's denial of AT&T's **sole defense of fraudulent use** under section 2.2.4 of FCC Tariff No 2. Hence, there is nothing for the FCC to decide on the issue referred by the Third Circuit and this is why the FCC has not ruled. A decision on all possible issues that may be presented in a case is never required—only what was referred. By Supreme Court Law the stay has been lifted and there are no other issues to resolve and the case should proceed to damages.

**AT&T Violates 2.1.8 by Completely Shutting 2.1.8 Down for Traffic Only Transfers**

79) AT&T's Joyce Suek said AT&T counsel ordered the violation of AT&T's 2.1.8 tariff to stop quick and easy direct 2.1.8 transfers to prevent 66% discount. Ms. Suek's use of the term "Partial TSA's" means "traffic only" transfers under 2.1.8 **T**ransfer **S**ervice **A**greement (TSA). **EXH U**

> Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally **we "no longer" process partial TSA's, the TSA must be for the whole plan.**

So no matter what obligations transfer AT&T was not allowing section 2.1.8 to be used for transferring only traffic. AT&T unlawfully shut 2.1.8 down and forced aggregators to delete accounts and get new signatures from thousands of end-users to add them to the 66% discount plan. **EXHIBIT V**

80) AT&T counsel Charles Fash misrepresented that 2.1.8 did not allow traffic transfers:

> "I will address the "partial TSA" issue first in general and then with your clients express and announced intentions. The Transfer of Service provision of the tariff addresses the issue of **transfer of service, not transfer of traffic** by moving individual locations from one plan to another. The proper way to move traffic (i.e. a subset of locations on a plan) between plans is to submit service orders **to delete the locations from one plan and add the locations to another**." (AT&T Counsel Fash July 7th 1995 stated the way to move accounts was as FCC 2003 stated.)

The DC Circuit of course was correct that 2.1.8 allows traffic only to transfer without the plan transferring as done by CCI-PSE. AT&T counsel obviously knew 2.1.8 allowed traffic only transfers. AT&T simply did not want to easily move accounts so aggregators could get bigger discounts. AT&T wanted to slow the aggregators down by making them delete each account and then forcing the aggregator to contact each end-user to get another signature. AT&T's goal was to simply scam every Judge possible as long as it did not have to transfer the accounts from 28% to 66% discount!

81) DC decided 2.1.8 allowed traffic transfers. Judge Bassler's referral is outside the scope of the case and moot. However, if Judge Bassler's referral was considered within the scope of the case it would still be **moot** as AT&T completely shut down 2.1.8 for traffic only transfers, no matter which obligations were transferred.

**AT&T Has Zero Evidence and Intentionally Misled NJFDC Judge Wigenton**

82) Transferring traffic only is an extremely common AT&T transaction—mergers, acquisitions, division sell-offs aggregator reseller traffic transfers, etc. AT&T presented **zero evidence** of traffic only transfers in which there was a transfer of the non-transferred plans revenue and time commitment ("customer plan obligations"). Public FCC filings on June 9th 2014 showed AT&T executives comments that customer plan obligations **don't transfer** on traffic only transfers. If AT&T's "all obligations" scam were true and practiced by AT&T executives, then AT&T would be able to show a few samples! After all AT&T would have the evidence in its control! Instead AT&T counsels submitted hundreds of pages to Judge Wigenton of complete fraud. AT&T does

this transaction daily and has the evidence. Instead AT&T counsels chose to intentionally scam Judges Bassler and Wigenton and the AT&T fraud was continued at the FCC.

83) The FCC's brief to the DC Circuit **EXHIBIT R** cited Judge Politan's Decision in which Judge Politan stated AT&T has never provided any evidence. However AT&T counsels misled NJFDC Judge Wigenton that AT&T "has responded" to the FCC as to why it has zero evidence: AT&T to Judge Wigenton:

> "Again, they have also made these contentions to the FCC (see Brown Cert., Ex. O at 73-76 (discussing alleged ambiguity) and 174-178 (**raising alleged other transfers of transfers of service**), and **AT&T has responded to those arguments in that proceeding**."AT&T Pg. 29

84) Obviously AT&T has **not** responded to the FCC about AT&T having no evidence! The FCC itself stated AT&T has never provided evidence! It was simply an intentional lie on Judge Wigenton because AT&T knew it had zero evidence.

Regarding AT&T having zero evidence, the FCC pg. 13 fn. 87 stated:

> "Assuming that further inquiry is appropriate, efficiency favors their resolution in the district court where the evidentiary record already has been developed."

85) AT&T is telling Judge Wigenton not to be concerned with the no evidence argument because AT&T is dealing with that argument at FCC! However, AT&T already knew the FCC in 2003 was advising the NJFDC to deal with the fact AT&T has no evidence! Can you imagine AT&T counsels having the nerve to tell Judge Wigenton that AT&T has already addressed that it has no evidence at the FCC when AT&T counsel knew the FCC itself was also making the point AT&T had zero evidence! It was an obvious intentional scam on Judge Wigenton so her Court would not question why AT&T has never presented any evidence of its 2006 minted "all obligations" fraud. It can't present evidence because none exists. It was an obvious intentional fraud on Judges Bassler and Wigenton and then on the FCC.

86) AT&T knew it had zero evidence and it knew it was violating Rule 11(b) **evidentiary support** mandate; to pull off the "all obligations" scam on Judges Bassler and Wigenton and the FCC. AT&T's in house counsel and outside firms need to get hit with substantial sanctions for intentionally scamming Judges Bassler and Wigenton for intentionally violating Rule 11(b) [6]

## AT&T Counsel Misled NJFDC Judge Wigenton that Security Deposits Against Shortfall On Traffic Only Transfers Had to Do with Inga-to CCI "Plan" Transfer

87) NJFDC Judge Wigenton was obviously asking AT&T counsel about transferring obligations in reference to the CCI-PSE transfer.

> The Court Page 10:
> THE COURT: Is it accurate, just from my understanding of looking at the history, the security deposit was in lieu of transferring the obligations?
> MR. GUERRA: **Not quite, your Honor.**
> THE COURT: Okay.
> **MR. GUERRA: Because the security deposit fight was over the first leg of the transfer.**

88) Mr. Guerra purposely deflected the Court to the security deposit issue on "first leg" Inga to CCI **plan** transfer that was a completely different type of deposit handled by the first district Court Decision in May of **1995.** Mr. Guerra evaded the **conclusive tariff evidence** presented by plaintiffs in its reply brief regarding security deposit **against shortfalls**, submitted to the FCC via (Tr. 9229) and introduced to Judge Politan by Counsel Meade in **1996**. This was **new conclusive tariff evidence** submitted to Judge Wigenton that shows customer plan obligations don't transfer on

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[6] **4.2.A.1 Standards for Making Representations to the Court:** Rule 11(b) provides that,"[b]y presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the **best of the person's knowledge**, information, and belief, formed **after an inquiry reasonable under the circumstances**" that the material presented is not filed for an improper purpose and has the **requisite degree of evidentiary** and legal support. This amendment "subjects litigants to potential sanctions for **insisting upon a position after it is no longer tenable**.

traffic only transfers under the tariff. It explicitly answered Judge Bassler's moot referral on which obligations transfer. AT&T's Meade conceded customer plan obligations **do not transfer** so AT&T via Tr9229 initiated deposits against the former customer on possible shortfall as the deposits of course go where the liability is:

> "On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the **CCI-PSE** transfer--- **the segregation of assets (locations) from liabilities (plan commitments)** --- in the following manner. See pg.7 para 15 Meade cert. **EXHIBIT W**

89) Segregation of assets (means end-user accounts go to PSE) from liabilities (revenue and time commitment on CCI) that must remain with CCI. That security deposit tariff change protected AT&T from possible shortfall charges and was applied to **all** AT&T **former** customers—**simply because customer plan obligations don't transfer on traffic only transfers!**

90) Under AT&T's "all obligations" scam customer obligations transfer! The fact that under the tariff the customer plan obligations are remaining after accounts are removed is conclusive tariff law that these plan obligations **do not transfer**. AT&T's Meade in 1995 also certified to Judge Politan that Tr. 9229 added security deposit against potential shortfall requirements on AT&T former customers; because accounts being transferred away were being used to meet the non-transferred plans **remaining commitments**. Tr9229 became a prospective tariff change and avoided AT&T from subjectively evaluating the former customers **"intent"** of evading shortfall by trying to get rid of revenue producing accounts and keep the plan commitments. AT&T counsel Meade conceded in 1996:

> The Deposit for Shortfall Charges included in Transmittal No. 9229 is a **"new concept"** that meets **AT&T's business concern** more directly, without addressing the question of **intent.** Because this is **new,** it **will apply only to newly ordered term plans**, and so would **not be determinative** of the issue presented on the **CCI/PSE transfer**. (Meade certification pg.7 para 16 **EXHIBIT W)**

91) This 1996 security deposit was NEW evidence that was conclusive tariff evidence (see EXH X) that answered Judge Bassler's moot referral: Under **AT&T's tariff the revenue and time commitments do not transfer on traffic only transfers.** AT&T in 1996 under Tr9229 imposed the security deposit against potential shortfall charges on the **former customer** when too many revenue producing accounts were transferred away. When accounts are **transferred away** (i.e. traffic only transfer) those accounts transferred away revenue could no longer be used by the former customer to meet its tariffed remaining revenue commitment. So AT&T filed Tr9229 to require a security deposit against former customers' potential shortfall charges. When too many revenue producing accounts were transferred away from the former customer—that had to keep its revenue commitment under 2.1.8., AT&T can demand security deposit. Previously to Tr9229 AT&T introduced (Tr8179) which initially wanted to automatically **force the plan to transfer in order to force the plan obligations to transfer**.

92) AT&T counsels Meade's 2.16.95 letter to the FCC's David Nall for AT&T's TR8179 pleading asserted the CCI-PSE transfer "**elevates form over substance.**" Meade conceded 2.1.8 was being followed i.e. **"FORM"** (the correct tariff procedure) ----but AT&T wanted it considered a **plan** transfer due to the percentage of accounts being transferred i.e. **Substance**---because only as a plan transfer do customer plan obligations transfer. The FCC rejected AT&T's "elevates form over substance" argument. Under 2.1.8 there is no sliding scale of obligations to transfer based upon percentage of accounts/revenue transferred. Whether 1% or 99% of the accounts are transferred the customer plan obligations don't transfer when the plan does not transfer.

93) AT&T's only defense was 2.2.4 fraudulent use. AT&T conceded section 2.1.8 was being adhered to. There has never been an option under 2.1.8 to transfer traffic and transfer plan obligations without the plan transferring—otherwise AT&T wouldn't have filed Tr8179 to force the

plan to transfer to force obligations to transfer. This Tr9229 security deposits was as Meade stated a "new concept" and a different way to protect AT&T.

94) Notice that under Tr9229 tariff change, the calculation to determine how much of a security deposit against shortfalls is needed compares the end-users revenue that remains on the former customers plan--- after some traffic is transferred ---to the former customers **non transferred plans commitment**. This is explicit tariff law showing revenue commitments don't transfer on traffic transfers. Likewise termination obligations don't transfer. See FCC 2003 Decision Pg.8 FN56

> Opposition at 5. Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) **is not at issue here.** Opposition at 3 n.1. That is consistent with the facts of this matter; **petitioners never terminated their plans.** Accordingly, termination charges are not at issue in this matter.

95) Shortfall and termination liability occur if the AT&T customer doesn't meet **its plan's revenue and time commitment.** AT&T claimed that termination liability is not an issue as CCI isn't terminating the plan with its **non-transferred commitments**. AT&T conceded to the FCC that the termination obligation did not transfer if plan doesn't transfer. That's why AT&T can't produce any evidence since none exists. Even though Judge Bassler's referral is outside the scope of the case, AT&T's counsel Guerra intentionally evaded the critical evidence filed by plaintiffs that answered the moot Judge Bassler referral.

## AT&T Mints New Defense in 2005 and Asserts PSE Assumed No Obligations

96) This is yet another AT&T scam that the Jan 12th 2007 FCC Order barred as outside the scope of the case as AT&T initially minted this bogus new defense at DC Oral argument. However plaintiffs will provide evidence that AT&T intentionally misled NJFDC Judge Wigenton during oral argument.

Guerra Page 8 Para 1 of oral argument:

> But they wrote **"traffic only"** on the forms. And **everybody has understood** that to mean that they weren't in fact assuming the obligations, PSE wasn't.

NJFDC Judge Wigenton also addressed this Traffic-Only zero obligations assertion by Mr Guerra Page 9:

> THE COURT: So your position, then, Mr. Guerra, is had there been some understanding that all the obligations would transfer as well, then everything would have obviously proceeded and the contracts would have been fine and AT&T would have been on board. It was the notation of **"traffic only"** which was sort of the impediment?
> MR. GUERRA: **Yes. And, again, this is the understanding that the DC Circuit had, the FCC had.**

97) As usual AT&T counsel makes assertions but doesn't provide evidence because the actual evidence is completely contrary to Mr. Guerra's intentional lie to NJFDC Judge Wigenton. No Court or FCC has ever stated zero obligations were being transferred by CCI and assumed by PSE. The FCC 2003 Decision explicitly states AT&T's **only defense** was 2.2.4 fraudulent use not this 2.1.8 defense. AT&T raised no defenses as to plaintiffs not adhering to 2.1.8 by transferring and assuming zero obligations. This is why the FCC 2007 Order banned these 2.1.8 scam defenses.

98) Please look at the **actual evidence** of what Judge Politan clearly understood. Judge Politian's decisions show PSE was assuming the 2 obligations stated on 2.1.8. The bad debt was assumed by PSE and PSE's RVPPP Pool of credits as the PSE plan pays any bad debt of the end-user accounts transferred from former customer CCI as indicated here:

> May 1995 Decision. (JA 59) "As under the arrangement with plaintiffs, AT&T bills **PSE's end users** directly, subtracting from the bill that amount of discount **allotted by PSE** to each individual end user. In turn AT&T remits to PSE the difference between the latter's 66% overall discount and that passed on to the end user. As in the plaintiffs' case AT&T deducts from the RVPP discount/rebate remitted to **PSE any bad debt** or unpaid bills accrued by its end users."

Obviously Judge Politan never believed zero obligations were being transferred as Mr Guerra misled Judge Wigenton. Judge Politan would have questioned the transaction if PSE was

accepting zero obligations! How does Mr. Guerra continue to intentionally lie when the record is so explicit? Mr. Guerra was willing to risk his license to keep billing AT&T for his scam hours.

99) The FCC also clearly understood traffic only non-plan transfer was being ordered not Mr. Guerra's zero obligations were being assumed. The FCC 2003 Decision FCC Decision: pg.3:

> "At the bottom of each TSA, in handwriting, these parties directed AT&T to move the **"Traffic Only"** on each plan to PSE. The January 13th cover letter, under which these nine TSAs were forwarded, directs AT&T to "move the locations associated with these plans [but] **not in any way to discontinue the plans."** In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSTPII/RVPP plans, but **not to move the actual plans themselves**."

Clearly the FCC understood transfer traffic only not the plan! How does Mr. Guerra possibly assert that everyone understood no obligations were transferred?

100) The AT&T TSA form allowed for either plan transfers or traffic only transfers. It was therefore customary to advise AT&T which type of transfer was being ordered. Look at the Transfer of Service (TSA) order forms **EXHIBIT** N. Mr. Guerra wanted Judge Wigenton to believe the form said: **Traffic Only don't transfer any obligations**! AT&T counsel Guerra has "short quoted" what was stated and then spun a completely different meaning. AT&T's counsel David Carpenter was the first to use this NO OBLIGATIONS scam during Oral Argument at the DC Circuit. This AT&T scam was developed **10 years into the case!** At **EXHIBIT** N pg. 4 notice PSE's actual cover letter that was given to AT&T with **proper** TSA forms:

> Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

Yes properly executed! There was no request to modify the terms and conditions of 2.1.8! All the evidence is completely contrary to Mr Guerra's lie to Judge Wigenton.

101) Plaintiffs initial brief to the FCC stated the transaction was **per the tariff** section 2.1.8 Transfer Service Agreement (TSA) as it had always done before and AT&T never refuted this.

> "In fact the tariff and AT&T's own form, the Transfer of Service or Assignment (TSA) form, made it possible. We did an assignment of end-user accounts as **per the tariff** and what had been commonly accepted in the marketplace for years." Para 53 of the Joint appendix to the DC Circuit JA 446

The AT&T TSA does not only state "Traffic Only" as AT&T misleads, it actually states:

> "Traffic only move all BTN's except 181-000-0142-457, 131-134 0230-254 CSTP/**Keep Plan # 3663 Intact**. **See EXHIBIT N**

102) AT&T's itself conceded the 2 obligations listed on 2.1.8 (bad debt and minimum payment period) were being assumed by PSE---not this 2015 bogus assertion that zero obligations were being transferred! AT&T's only defense in 1995 was its meritless 2.2.4 fraudulent use defense as AT&T conceded CCI keeps its customer plan obligations to pay liabilities under plan:

> "In fact as explained in its initial comments, the basis for AT&T's **"fraudulent use"** claim was that the proposed transfer would have transferred the entire revenue stream to PSE **without the corresponding obligations to pay any shortfall and termination charges under the CSTPII plans"** AT&T's initial 2002 FCC Reply: FN 9 JA 535:

103) All Courts and the FCC clearly understood PSE was assuming bad debt and minimum payment period. Plaintiffs filed a Post Oral DC Circuit Oral Argument Motion to Clarify and Correct the Facts of the Record due to AT&T counsels David Carpenter misrepresentations made during oral argument. Plaintiffs clearly stated on pg. 6 para 8 that the bad debt and minimum payment period were being transferred to PSE:

> "Another serious misstatement was made that Appellant was at risk of being unprotected in the event of nonpayment for services. For example, the intended transferee of Intervenors accounts, **PSE, in fact assumed the obligation for past indebtedness and the un-expired portion of any applicable minimum payment periods." Exhibit Y page 6 Para 8**

104) Even the DC Circuit Decision reiterated what plaintiffs stated in its post oral argument brief that the 2 obligations indicated on the AT&T TSA form under 2.1.8 were being transferred:

> "In a motion submitted after the argument, however, the Inga companies note that the only obligations enumerated by Section 2.1.8 are **"outstanding indebtedness for the service" and "the unexpired portion of any applicable minimum payment period."** Intervenors Motion to Clarify and Correct the Facts of the Record at 4 **EXHIBIT O**
> DC Circuit pg. 11 footnote 2

105) AT&T first raised its bogus Traffic Only –No Obligations defense during the DC Circuit Oral argument. There is nowhere in the record from 1995 up to the DC Circuit where AT&T ever argued that PSE was not assuming the 2 obligations on the face of 2.1.8. This 2.1.8 defense was of course banned by the Jan 12th 2007 FCC Order. Plaintiffs filed the DC Post oral argument motion in part to address AT&T's new bogus defense as one of several misrepresentations that AT&T counsel David Carpenter made.

> "Mr. Carpenter made numerous statements during oral argument that PSE did not assume any of the obligations. ...This statement is incorrect because **the TSA form shows that the two obligations to be assumed – indebtedness and unexpired time period were assumed by PSE.** …**Appellant modified the actual notations to read "Traffic only**…" then argued that the aggregator only wanted to move traffic and wasn't assuming the obligations. …The tariff doesn't offer the customer the option of separating the traffic revenue from potential indebtedness on the same account….What the notations mean is that Appellant was being asked to move all the traffic except for 2 accounts and leave the existing CSTP plans intact." **EXHIBIT Y page 6-7 para 9**

Plaintiffs have always maintained it "properly" did the CCI-PSE transfer under 2.1.8, as opposed to the FCC's delete and add account movement under 3.3.1.Q. Plaintiffs stated to DC Circuit:

> The FCC's view of the transaction hinges on section 3.3.1.Q of AT&T's tariff. **It has always been Intervenors position that section 2.1.8 expressly allows for the transaction intended in transferring the accounts to PSE.**

106) During the DC Circuit proceedings AT&T knew it would be impossible to overturn the FCC's denial of AT&T's only defense of fraudulent use. AT&T needed to argue against the FCC that 2.1.8 allowed accounts to move without the plan. However AT&T knew it would be arguing

**in favor of plaintiffs** that properly used to 2.1.8. So AT&T minted during DC Circuit oral argument its traffic only –no obligations were assumed by PSE fraud to simultaneously attack plaintiffs. When the DC Circuit Decision showed the DC Circuits understanding that PSE was to assume the 2 obligations listed on 2.1.8, AT&T then needed to introduce to Judge Bassler's Court the "all obligations" scam.

107) AT&T's position to the DC Circuit was still that customer plan obligations **do not transfer** on traffic only transfers. AT&T counsels Guerra and Brown threw all its scam against the wall to see what sticks in Judge Wigenton's Court. Obviously there was no Court or the FCC that understood no obligations were being transferred. The record is so explicit and this AT&T scam had already been exposed when David Carpenter introduced it in the DC Circuit. Still Mr Guerra had the audacity to intentionally lie to Judge Wigenton again with the same scam! If you are going to scam a federal Judge why come up with a scam where the evidence is so overwhelming against AT&T?

> Guerra:
> But they wrote **"traffic only"** on the forms. And **everybody has understood** that to mean that they weren't in fact assuming the obligations, PSE wasn't.

108) Not one single Court understood this but Mr Guerra lied to Judge Wigenton that Judge Politan, The Third Circuit, the FCC the DC Circuit and Judge Bassler all understood this! How has this man been able to keep his license? This is not client advocacy! This is intentional fraud on a Federal Court. Mr. Guerra's obvious willingness to intentionally lie to federal judges cannot be allowed to continue.

**AT&T Intentionally Misleads Court as it Scams NJFDC Court by Revising History**

AT&T lied to NJFDC Judge Wigenton that it was its position in 1995 that PSE must assume all obligations on the traffic only transfer. All obligations only transfer on a plan transfer not a traffic only transfer so what AT&T did was to first mischaracterized the CCI-PSE Transfer as a "PLAN" Transfer Instead of a "Traffic Only" transfer then quoted from AT&T's own brief under that false predicate.

109) This issue is also barred by the Jan 12 2007 FCC Order because it deals with section 2.1.8 defenses. However plaintiffs will show how AT&T intentionally deceived the NJFDC Judge Wigenton with its intentionally misleading "**well prepared**" oral comment.

> "Here's what AT&T said in its March 9, 1995 submission to Judge Politan. It said that it "refused to permit the transfer precisely because PSE," the new customer in the transfer, "did not assume all the obligations of the **old customer**." That's from page 7 of Exhibit A to the Brown certification. So the issue about whether PSE was obligated to assume all of CCI's obligations has been in this case for 20 years. (Mr. Guerra pg. 8 March 18th 2015 oral argument)

110) Out of Context Scam: AT&T's referenced a statement that was based upon its **mischaracterization** of CCI-PSE transfer as a **PLAN** transfer to falsify its real position in 1995 that all obligations don't transfer on traffic only transfers. In 1995 AT&T bogusly asserted the CCI-PSE transaction as a **PLAN TRANSFER** then said this plan transfer would require PSE to assume customer plan obligations! Obviously Judge Politan would not have AT&T presenting a fraudulent use defense in which AT&T took the position that all obligations **don't transfer under the tariff,** while **simultaneously** asserting Mr. Guerra's "revised history" that AT&T was asserting in 1995 that plan obligations **must transfer** on the CCI-PSE traffic only transfer! AT&T was asserting fraudulent use in 1995 which takes the position that CCI will not meet the plan commitments that don't transfer because the plan is not transferring. So how could AT&T in 1995 ever have asserted to Judge Politan that PSE was refusing to assume the customer plan

obligations that AT&T itself claimed in 1995 **must stay with CCI!** AT&T's only defense was fraudulent use**.** (Judge Politan's May 1995 Decision pg. 10 para 2)

> On January 13, 1995, PSE and CCI jointly executed and submitted written orders to AT&T to transfer the 800 traffic under the plans CCI had obtained from the Inga companies to the credit of PSE. Only the traffic was to be transferred, not the plans themselves. In this way, **CCI would maintain control over the plans** while at the same time benefiting from the much larger discounts enjoyed by PSE under KT-516. AT&T refused to accept this second transfer on the ground that CCI was not the customer of record on the plans at issue, and thus could not transfer the traffic under those plans to PSE. **AT&T was further troubled** by the fact that if **only the traffic on the plans and not the plans themselves were transferred to PSE**, the liability for **shortfall and termination charges attendant thereto would then be vested in CCI**: an empty shell in AT&T's view."

111) AT&T's Counsel Brown on 4.25.96 to Third Circuit also mischaracterized CCI-PSE transfer as a **plan** transfer then asserted it was **self-evident** for traffic only transfers that obligations **don't transfer**:

> "CCI Notes that a transfer of service can apply either to individual end user locations or to entire plans. See CCI Br. At 31-32 & n13. CCI then, incongruously, seeks to defend the District Court by citing "record evidence" that addressed transfers **individual end user locations (not entire plan liabilities), and showed that the only "obligation" transferred to the "new customer" in that event is the unpaid liability associated with the individual end user location** that is transferred. **But that is self-evident under the tariff.** By contrast, when ***all*** the plan's traffic and locations are being transferred to a new customer and the "plan" would then exist only as an **empty shell**, then the "new customer" would not be assuming "all" the associated "obligations" unless it assumed the "existing customer's" shortfall and termination commitments."

Another mischaracterization that it was a **plan** transfer: AT&T FCC 2003 Reply J.Appendix 533:

> "Petitioners were precluded under the governing tariff from transferring their CSTP II **plans** to PSE unless PSE agreed to assume all of the Petitioner's obligations under those same **plans**, ***including tariffed shortfall and termination charges***." **(No emphasis added on italics).**

112) AT&T was conceding that the 2 obligations in 2.1.8 were transferred but AT&T simply mischaracterized the traffic only transfer as a **plan** transfer, not a traffic only transfer and then asserted as a **plan** transfer the *tariffed shortfall and termination charges* must transfer.

113) The AT&T scam was to correctly state how the obligations actually are allocated under 2.1.8 for a plan transfer but to **mischaracterize** the CCI-PSE transaction as a **plan** transfer when it was a traffic only transfer.

114) AT&T also misled the DC Circuit with its mischaracterization as it initially states "**in this case** the relevant WATS services are the CSTPII **plans** not traffic only. **(**DC Circuit page 7-8)

> "There, AT&T noted in passing that "**in this case** the relevant WATS services are **the CSTP II Plans**."....[Section 2.1.8], by its terms, **allows a transfer of CCI's service** to PSE only if PSE agreed to assume **all obligations under those plans.** *Yet CCI explicitly amended the transfer of services form to read "Traffic Only."* By expressly declaring that it did not intend to effectuate a transfer of all obligations under the **plans** to PSE . . . *the proposed transfer, on its face, violated the terms of Section 2.1.8.***"**

In this case the relevant WATS services transferred are **NOT** the CSTPII **Plans** it's Traffic Only! Having **mischaracterized** the CCI-PSE traffic only transfer as a **plan** transfer AT&T said that transferring "Traffic Only" violated 2.1.8., since "all obligations" were not being transferred if it was a **plan** transfer. All obligations do transfer if it's a **plan** transfer—but in this case the relevant service is not a **plan** transfer—it's a traffic only non-plan transfer. Mr. Guerra clearly understood the DC Circuit was confused by AT&T's mischaracterization then Mr Guerra asserted to the NJFDC Judge Wigenton on March 18th 2015 at page 8:

> "And the DC Circuit plainly understood this.

115) Obviously the DC Circuit didn't understand that AT&T's statement on which obligations transfer was based upon a plan and not a traffic only transfer. AT&T's "all obligations" reference at the DC Circuit was based on the CCI-PSE transaction being a plan transfer: **"In this case** the **relevant** WATS services are **the CSTP II Plans".** The DC Circuit didn't understand AT&T was actually asserting "all obligations must transfer only for a **plan transfer!**

116) AT&T's David Carpenter explicitly told the DC Circuit all obligations don't transfer on traffic only transfers. So AT&T's Guerra simply deceived Judge Wigenton by first quoting from AT&T's own brief where it mischaracterized the CCI-PSE traffic only transfer as a plan transfer: "here's what AT&T said in its March 9, 1995 submission to Judge Politan." Mr. Guerra took advantage of DC error: "and the DC Circuit plainly understood this!" AT&T's mischaracterization was done because there is a difference in which obligations transfer between plan and traffic only transfers.

117) If AT&T actually believed in 1995 that all obligations transfer for **either** a "traffic only" or a "whole plan" transfer it would not have felt compelled to mischaracterize the CCI-PSE traffic only transfer as a plan transfer; and AT&T couldn't have asserted its "obligations don't transfer" fraudulent use 2.2.4 defense. AT&T counsels understood that if Judge Wigenton recognized that AT&T first created its "all obligations" defense under 2.1.8 in 2006 to Judge Bassler as the reason it denied the Jan 1995 transfer ----Judge Wigenton would laugh hysterically at AT&T counsels. So AT&T counsels during oral argument scammed Judge Wigenton by doing some history revision asserting its 2006 created "all obligations" bogus defense was its defense in 1995!

118) There is absolutely no doubt that AT&T intentionally scammed Judge Wigenton. Mr Brown and Mr Guerra no doubt spent hours digging through the case file to come up with a fraud to get Judge Wigenton to believe that AT&T "all obligations" 2006 created nonsense was the reason it denied the CCI-PSE transfer in 1995. The FCC recognized AT&T had no defenses under 2.1.8 in 1995 and that is why the FCC's Jan 12th 2007 Order banned Judge Bassler's 2006 referral of AT&T's 2.1.8 defenses. The key here is that this was intentional fraud. It was not an off the cuff

remark made during oral argument---it was a well-rehearsed prepared "revise history fraud" on Judge Wigenton.

**AT&T Counsels Mislead Courts and FCC on AT&T "What was Proposed was Unique" Scam**

119) Guerra page 11 of Judge Wigenton Oral Argument

> the FCC is not talking about how obligations are to be assigned, or transferred, or assumed under 2.1.8, we're just talking about what the plaintiffs **proposed** to in which CCI was not going to transfer the obligations.

All of the AT&T counsels (Meade, Fash, Carpenter, Whitmer, Friedman,Barillari) were removed from the case. Mr. Brown's completely switched his position.[7] Dozens of statements are in the record from these former AT&T counsels all asserting that customer plan obligations don't transfer under 2.1.8 on traffic only transfers. Mr Guerra and Mr Brown lied to the NJFDC and FCC by asserting that what all its former AT&T counsels statements pertained to was not how the tariff worked but what was being **proposed** by plaintiffs. So what current AT&T counsels are bogusly asserting is that plaintiffs were **proposing** a transaction that was not what 2.1.8 allowed and it was therefore different than what AT&T allowed all its other customers. Total nonsense.

120) AT&T's filing of Tr8179 was an INDUSTRY WIDE attempt to stop **all AT&T customers** substantial traffic transfers not just plaintiffs. Many AT&T customers filed petitions to reject AT&T's attempt to change the norm for 2.1.8. AT&T's Tr9229 filing (security deposits against shortfall) was an INDUSTRY WIDE tariff change to stop all substantial traffic transfers not just plaintiffs. Obviously AT&T did not add security deposits against shortfall just for plaintiffs "proposed transfer." AT&T's counsel Meade certified to Judge Politan that Tr9229 was industry wide way AT&T was going to handle substantial traffic transfers. Plaintiffs have exhibited many other AT&T customers' certifications that all certified the norm for 2.1.8 was that customer plan obligations don't transfer on traffic

[7] Mr. Brown asserted to the Third Circuit that it is self-evident under 2.1.8 that obligations don't transfer on traffic only transfers. After the DC Circuit Mr. Brown was tasked with pulling off without evidence the "all obligations" fraud and completely changed his position. Apparently as long as AT&T keeps paying Mr. Brown he will promote whatever fraud his client AT&T desires.

only transfers. Of course if AT&T Counsels current assertion that the norm for section 2.1.8 was that customer plan obligations MUST TRANSFER on traffic only transfer that would obviously mean that AT&T has evidence of this alleged norm for 2.1.8 transfers and of course AT&T has no evidence. Plaintiff's transaction was as its TSA forms indicate a **proper** transaction. AT&T in 1995 did not assert that plaintiffs did not adhere to 2.1.8. AT&T's only defense was 2.2.4 due to the substantial size of the transfer. Current AT&T counsels attempted to cover up for all the comments and certifications of its former AT&T counsels. Mr Guerra intentionally lied to Judge Wigenton as Mr Brown lied to the FCC, bogusly claiming the FCC was interpreting a unique **proposed** transfer and not what the norm is for 2.1.8. The FCC 2007 Order of course denies all 2.1.8 arguments as AT&T's only defense was 2.2.4 fraudulent use. It just shows the intentional misrepresentations engaged in by current AT&T counsels.

**AT&T Intentionally Misquotes 2.1.8 Due To Customer Plan Obligations Not Listed**

121) There are only two obligations actually listed within section 2.1.8:

> These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

The AT&T transfer section 2.1.8 did not list the revenue and time commitment as part of the obligations to be transferred for the service selected for transfer. The DC Circuit Decision noted this in its last footnote. Only when a PLAN was actually transferred did the new customer have to assume the plans revenue and time commitment and associated obligations for shortfall and termination obligations on the plan. That is because the transaction would mean there is a **former** customer of the plan and the plan commitment s go along with it. The issue AT&T faced with Judge Bassler was that tariffs by law must be explicit or ruled against AT&T. Because section 2.1.8 did not list revenue and time commitments and their associated liabilities for shortfall and termination charges (i.e. customer plan commitments)----it could be ruled against AT&T that these obligations are not required as they are not listed. Most people would look at the language and say only what is listed should be required so AT&T needed to scam Judge Bassler into thinking that customer plan commitments are in 2.1.8. So AT&T needed to come up with a scam on Judge Bassler to make him think that customer plan commitments are within

2.1.8. AT&T counsels bogusly claimed that customer plan commitments are in the second obligation actually listed: “the unexpired portion of any applicable minimum payment period(s).”

122) AT&T incredibly changed its position 4 times regarding whether customer plan commitments were encompassed within “applicable minimum payment period(s)”. AT&T initially argued to the FCC in 1995 when it lost its TR 8179 Substantial Cause Pleading that transferring shortfall and termination (S&T) obligations were somehow encompassed within “minimum payment period.” Follow the history of AT&T counsels scam. The following FOIA notes of FCC staff reviewing AT&T’s Tr8179 filing show the FCC understood that AT&T’s 1995 attempt to claim obligations were somehow encompassed within “minimum payment period” scam did not work:

FCC’s R. L Smith 1995 FCC FOIA notes indicate:

> Moreover, the unexpired portion of any applicable min pay period would **not** seemingly include unexpired portion of any term of service and usage or rev commit but has its **own unique meaning** and, therefore, the provision about the term plan and commitments **being included as part of the min pay period** is conflicting and we find in favor of customers in cases of conflicts.

So in 1995 AT&T asserts this and the FCC understood customer plan commitments are not within the second obligation listed within 2.1.8.

AT&T Mr Brown states in 2006 AT&T Opp. Brf. To NJFDC Judge Bassler at p. 12-13, fn. 3.

> AT&T did not argue to this Court or the FCC "that S&T obligations are encompassed within minimum payment period." Motion at 13. But AT&T's **consistently maintained position** is that these obligations are encompassed within the phrase "all obligations, “not the phrase "minimum payment period."

123) Obviously AT&T Counsels 2006 assertion to Judge Bassler is not true as AT&T had argued to the FCC in 1995 that shortfall and termination obligations are encompassed within minimum payment period. Mr Brown simply lies to Judge Bassler that AT&T never made such an assertion. Mr. Brown in 2006 also states that AT&T has **consistently maintained** its position that S&T obligations are within the phrase “all obligations.” Notice how Mr. Brown focuses Judge Bassler on only the 2 words “all obligations” and not “all obligations of the **former** customer.” AT&T counsels also lies that it was a **consistently maintained** position that S&T

obligations are encompassed within "all obligations!" The first 10 years of the case (1995-2005) AT&T (Counsels Brown, Whitmer, Barillari, Meade, Friedman, Carpenter) all conceded that customer plan obligations don't transfer on "traffic only" transfers. AT&T of course never presented any evidence to Judge Bassler showing such a position from 1995 till after DC Circuit.

124) The two NJ District Court Opinions, the Third Circuit Decision, the FCC Decision and the DC Circuit Decision do not reflect AT&T ever asserting that 1) transferring S&T obligations were within minimum payment period(s). Or 2) AT&T never asserted revenue and time commitment transfer as AT&T was only asserting its fraudulent use defense.

125) In 2005 before Judge Bassler AT&T counsel Mr. Brown again reverted back to the old 1995 TR8179 Substantive Cause initial position that S&T obligations are within 2.1.8's second obligation "minimum payment period;" but added a brand new twist to Judge Bassler that only the first list obligation for indebtedness was transferred to PSE and not the second one listed, "minimum payment period". Thus, for the first time ever, Mr Brown asserted that petitioners did not transfer the second obligation (minimum payment period), which AT&T counsels now bogusly claim includes the requirement to transfer S&T obligations.

126) Mr. Brown first took a comment made in 2005 to DC Circuit totally out of context. Then claimed that the reason why AT&T did not do the **1995** "traffic only" transfer was because of this comment made **ten years** later 2005!

127) The following shows AT&T counsel Mr. Brown in 2005 is now back to customer plan obligations volume requirements are within the "minimum payment period" of 2.1.8:

AT&T June 13, 2005 Brf. at p. 7-8.

> First section 2.1.8 requires assumption of all obligations of the former customer, including (1) outstanding indebtedness and (2) "the unexpired portions of any minimum terms of service period." But the Inga Companies asserted that **only the latter obligations** must be assumed and that the term and volume requirements at issue here not matters that had to be assumed, relying on the irrelevant ground that the minimum term for other WATS services under the tariff is one day. JA 187 (See Tariff No 2 Section 2.5.5, Brown Aff., Ex. C)

128) Notice AT&T placed quotes around the second obligation above to focus on minimum payment period and then deliberately **misstated** it as "service period" than "payment period" to

further give the impression that S&T obligations are somehow **within minimum payment period**:

AT&T again in 2005 to the District Court:

> Under their view, the Court should now determine such matters as whether the phrase "all obligations" in section 2.1.8 somehow excludes minimum volume/term commitments; **whether these commitments are part of the minimum payment periods" within the meaning of section 2.1.8**
>
> (2) that the term and volume commitments that give rise to shortfall/termination liabilities **are not unexpired portions of minimum payment periods**,

129) AT&T counsel Mr Brown in **2005** simply revised the old 1995 FCC already defeated initial position that transferring S&T obligations was somehow **within minimum payment periods.** Mr Brown simply changed the language of 2.1.8 to make his fraud more feasible. Then a year later AT&T's Counsel's Brown's re-argument reply brief in the District Court at 12-13, n. 3. in **2006** did yet a another switcheroo for the second time to the same Judge!

> AT&T's **consistently maintained** position is that these obligations are encompassed within the phrase "**all obligations," not the phrase** "minimum payment period.

130) Ok so now AT&T counsels no longer are saying the customer plan commitments are within minimum payment period. AT&T counsels are back to focusing the Court on only the two words of the full sentence "all obligations." What happened is plaintiffs showed Judge Bassler the FCC FOIA notes stating S&T obligations are not encompassed within "minimum payment period." So Mr. Brown dropped the Customer plan obligations are encompassed within "minimum payment period fraud and went with his "all obligations fraud".

131) Imagine AT&T Counsel Brown even told the District Court Judge Bassler that it was a **consistently maintained** position! Mr Brown didn't maintain his own position within one year before the same Judge let alone AT&T's 4 time change over 20 years! AT&T created new bogus defenses and constantly changed positions. When plaintiffs pointed out to Judge Bassler the bogus Mr. Brown assertion that AT&T is actually claiming that it didn't process the transfer in 1995 based upon it short quoted comments made by plaintiffs in 2005, AT&T dropped that fraud also.

132) The most egregious part of AT&T's frauds are that AT&T counsels arguing with each other's frauds. Counsel Charles Fash and Joyce Suek asserted 2.1.8 no longer allowed "traffic only" transfers. Mr Brown, Whitmer, Meade, Friedman, Barillari, from 1995-2005 argued "fraudulent use" conceding the two obligations listed were transferred and under the tariff S&T obligations don't transfer as AT&T only asserted "fraudulent use". Mr Brown changed it to 4 obligations needed to be transferred after 2005. Mr. Brown simultaneously argued in 2005 to NJFDC that S&T was somehow included within 2.1.8 as it was encompassed within 2.1.8's "minimum payment period" and petitioners didn't transfer 1 of the two obligations listed on 2.1.8. AT&T counsel David Carpenter's fraud 2005 in DC Circuit was "traffic only" transfers were allowed but "Zero Obligations" were transferred. At the same time AT&T's initial briefs on fraudulent use stated that one of the obligations "Termination" obligations weren't an issue because the plans weren't being terminated—as also noted by the FCC 2003 Decision.

133) So AT&T counsels each asserted frauds in which zero, 1, 2, 3 obligations were transferred and one obligation Time Commitment that produces "termination" charges if not met because AT&T conceded CCI's plans were not being terminated. Plaintiffs had to use an .xls spreadsheet to track each counsel's fraud and the time period of the fraud. AT&T literally was throwing its "defenses" up against the wall to see what would stick. There was never any question prior to 2005 as to what obligations transfer when "traffic only" and not the plan transfers under 2.1.8. After extensive testimony the NJ District Court had no problem understanding which obligations transfer as AT&T counsels (Whitmer, Meade, Barillari, Carpenter, Friedman, Brown) had all detailed the allocation of obligations under 2.1.8 when AT&T made its "fraudulent use" defense. The only thing "consistently maintained" by AT&T counsels was their willingness to intentionally lie to each Court and the FCC.

**Breakdown of AT&T Counsels Scams on Courts and FCC**

The following is a list of the main scams AT&T counsel used on the Courts and FCC.

I) Asserting Fraudulent use (2.2.4) when the plans had already met fiscal year revenue commitments and Judge Politan had already determined the plans were pre June 17th 1994 immune so AT&T had no merit to assert it would lose the ability to collect shortfall charges. AT&T Counsels involved in this initial AT&T 2.2.4 scam defense:

1) Frederick Whitmer 2) Richard R. Meade 3) Aryea Friedman 4) Edward Barrillari 5) Charles H. Fash (Note all these AT&T counsels asserted that under the tariff customer plan obligations ---revenue and time commitments **don't transfer** on a traffic only non-plan transfer.)

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II) Mischaracterizing the CCI-PSE traffic only non-plan transfer was an entire plan transfer.

AT&T position to Third Circuit: 1) Edward Barrillari 2) David Carpenter 3) Richard H. Brown.

The following are the AT&T Counsels that pulled the same scam on the D.C. Circuit:

NJ Counsels: 1) Lawrence J. Lafaro, 2) Peter H. Jacoby, 3) Aryeh Friedman

DC Counsels: 4) David W. Carpenter 5) James F. Bendernagel, Jr. 6) C. John Buresh

7) Michael J. Hunseder

This mischaracterization fraud as dropped after the DC Circuit Decision because AT&T took the position from 2006 forward that it didn't make a difference whether a traffic only or a plan transfer was being ordered –"all obligations" had to transfer. Since there was no longer a need to mischaracterize the transaction as plan transfer this fraud was dropped after D.C. Circuit.

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III) AT&T Counsels Revisionist History Scam on NJFDC Judge Wigenton.

AT&T during Oral argument AT&T reads prepared statement that bogusly asserts its position was in 1995 that "all obligations" transfer on traffic only transfers. In reality the passages AT&T cited were AT&T asserting that "all obligations" only transfer if it is a plan transfer. Mr. Guerra and Mr. Brown were the AT&T counsels that pulled the scam on Judge Wigenton.

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IV) "Traffic Only Short Quote scam minted in 2005 asserts Zero Obligations were transferred.

1) Created in 2005 by David Carpenter at DC Circuit oral Argument. AT&T counsels Richard H. Brown and Joseph R. Guerra continued to assert this scam to Judge Bassler in 2006 and Judge Wigenton.

David Carpenter and Joseph Guerra are DC licensed Attorneys. Mr. Brown is a NJ Licensed attorney.

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V) AT&T's post DC Circuit minted "All Obligations" defense that under 2.1.8 Revenue and Time Commitment must transfer on a traffic only non-plan transfer.

Attorneys involved in this obvious fraud with attempted cover-up are listed on the last page of AT&T's FCC filing Dec 20th 2006 after Judge Bassler's 2006 referral. This link http://snipurl.com/attscam OR http://apps.fcc.gov/ecfs/comment/view?id=5513867548

1) Richard Brown 2) Joseph R. Guerra 3) Peter H. Jacoby 4) Paul K. Mancini 5) Gary L. Phillips 6) Lawrence J. Lafaro

These same AT&T counsels Jan 31st 2007 FCC filing on page 5 footnote 2 assert the following are AT&T's two defenses:

> (1) which obligations should have been transferred for the 1995 proposed CCI-PSE transfer to be in compliance with the tariff, and (2) the validity of AT&T's alternative basis for refusing to process the transfer under the tariff's **antifraud provisions**

AT&T had one defense in 1995 (fraudulent use referred to as antifraud provisions). In 2007 AT&T not only asserted its new 2006 created "all obligations" fraud that customer plan obligations **MUST TRANSFER** on traffic only transfers AT&T again asserted its already denied fraudulent use defense; based on customer plan obligations **DON'T TRANSFER!** So **simultaneously** AT&T is arguing to the FCC against itself. Both defenses are gone!

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VI) AT&T's fraud on D.C Circuit that AT&T had denied the traffic transfer within the 15 days statute of limitations date within section 2.1.8. The following are the AT&T Counsels involved in the DC Circuit proceeding:

**NJ Counsels:** 1) Lawrence J. Lafaro, 2) Peter H. Jacoby 3) Aryeh Friedman
4) Richard H. Brown

**DC Counsels:** 4) David W. Carpenter 5) James F. Bendernagel, Jr. 6) C. John Buresh

7) Michael J. Hunseder 8) Joseph R. Guerra

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VII) AT&T's fraud that Customer Plan Obligations are encompassed within the Second Obligation: the unexpired portion of any applicable minimum payment period(s).

This scam was done on FCC during AT&T's Tr8179 pleading by Richard Meade. The same scam was done on Judge Bassler by DC attorney Mr. Joseph Guerra and NJ attorney Mr. Richard Brown. Mr. Richard Brown is the only counsel that was involved in the case originally when Mr Brown claimed it was self-evident that customer plan obligations don't transfer----then Mr. Brown led AT&T's defense in 2006 when it changed its defense to all obligations must transfer.

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VIII) AT&T Counsels Misrepresentation that Plaintiffs Transaction was a **"Proposed Transaction"** under 2.1.8 that was not within what the alleged industry norm was for 2.1.8. This AT&T scam was used on NJFDC Judges Bassler and Wigenton and on the FCC as a way to cover-up for former AT&T counsels statements regarding the terms and conditions for section 2.1.8. AT&T counsels Richard Brown NJ counsel and Joseph Guerra DC Counsel misrepresented this.

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IX) As noted by DC Circuit 2.1.8 does allow traffic only transfers. AT&T counsel Charles Fash (NJ counsel) misrepresented section 2.1.8 simply does not allow Traffic Only Transfers at all--no matter what obligations transfer. It was used to force plaintiffs to delete accounts one at a time and then resign each account in order to prevent easy bilateral 2.1.8 traffic transfers from 28% to 66% discount.

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X) AT&T's Position that the Security Deposits Against Potential Shortfall on traffic only transfers had to do with only "first leg of transfer" which was the plan transfer. AT&T Counsel Joseph Guerra (DC Counsel) evaded conclusive tariff at Judge Wigenton's Oral argument.

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## SUMMARY

The FCC's Jan 12th 2007 Order stating that AT&T's "all obligations" defense is "outside the scope of the case" and "does not expand the Third Circuit referral" was a polite way of saying: AT&T we know you created defenses in 2005 and later to scam the NJFDC Judge Bassler. Issues under section 2.1.8 like "no obligations were transferred" and "all obligations" must transferred were never issues AT&T asserted in 1995 to Judge Politan. Because this is nonsense the FCC will not consider your scam that you managed to pull on the NJFDC.

AT&T's in house counsels intentionally switched out attorneys while keeping the same outside firms Sidley Austin and Day Pitney to intentionally scam Federal Courts and the FCC. AT&T's in house counsels coordinated these bogus defenses for almost 21 years. Unsupported with actual evidence defenses were created and old ones often recycled to escape from justice. The FCC and State ethics staffs need to haul in all the AT&T attorneys and see who see who finally comes clean. Any behind the scenes AT&T in-house counsels that are responsible for the creation of scams asserted by the outside counsels need to be identified and also lose their licenses.

If AT&T counsels weren't intentionally engaging in a fraud it would have simply produced a few dozen samples of traffic only transfers in which the customer plan obligations actually transferred. No evidence exists. AT&T executives will tell you AT&T's counsels are intentionally engaging in a fraud on the Courts and FCC. AT&T has finally scammed its way into an "all obligations" position that AT&T knows there is no evidence to support its fraud. AT&T to Judge Wigenton…..

> (**raising alleged other transfers of transfers of service**), and **AT&T has responded to those arguments in that proceeding**."AT&T Pg. 29

Imagine AT&T's counsels having the audacity to scam Judge Wigenton into believing AT&T had addressed at the FCC why AT&T has no evidence! Imagine having the nerve to read at oral argument a prepared misleading statement to revise history! No Mistake-Intentional Fraud!

The FCC's Jan 12th 2007 Order correctly determined Judge Bassler's referral was outside the scope of the Third Circuit Referral. The FCC's Order confirms its position that AT&T had to scam Judge Bassler to get his Court to refer an AT&T 2.1.8 defense asserted ---***without evidence***-- that was first **created** in the **YEAR 2006** as AT&T's brand new justification for denying the CCI-PSE transaction in the **YEAR 1995!**

Section 2.1.8 has a 15 days statute of limitation not 11 years into the case!

To protect the public all AT&T counsels involved in AT&T's intentional fraud need to be disbarred.

11.2.15
Group Discount's Inc.
Al Inga President